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THE MEMORIAL LECTURE SERIES — 1977

THE COMMUNICATIVE TORTS AND THE FIRST AMENDMENT — *John W. Wade*

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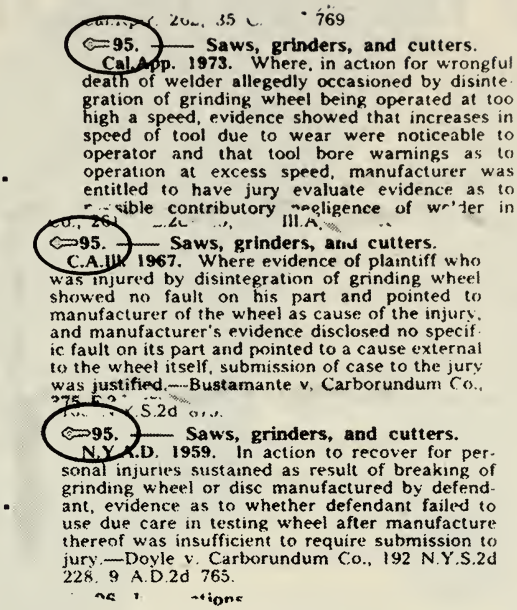

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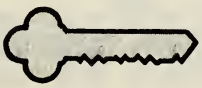

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EDITOR'S NOTE: The second part of Professor Cochran's article, *Civil Rights Litigation in the Fifth Circuit*, originally scheduled for Issue 1 of Volume 49, will be published in a later issue of that volume.

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The theme for the Lectures is "The Role of Law in the Remainder of the Twentieth Century." The Lectures each year exploit this general theme and, through the vehicle of the lecturer's particular subject matter area, explore the influence of law—both potential and actualized—on our civilization.

The Lectures, presented each spring at the Law School, are subsequently published by the *Mississippi Law Journal*. They are thus made available to every Mississippi judge and practitioner and to academic law libraries throughout the country.

As the initial lecturer, we were honored to have Philip B. Kurland, Professor of Law at the University of Chicago Law School. Professor Kurland's presentation on "Watergate, Impeachment and the Constitution" established a high standard of scholarly excellence for this Series.

The second year we were privileged to hear lectures on the topic "The Jurisprudence of Liberty" by one of this country's most important legal philosophers, Professor Charles Frankel of the Columbia University School of Law.

In 1976 we heard another of America's distinguished legal scholars, Dean Monrad G. Paulsen of the University of Virginia Law School. Dean Paulsen lectured on "Families, Children and the Constitution."

This year the Lectures are presented by the most distinguished American legal scholar currently writing in the field of tort law, Dean John W. Wade. Born in Little Rock, Arkansas, Dean Wade obtained his undergraduate and law education from The University of Mississippi, where he was awarded the Bachelor of Arts degree in 1932 and the Juris Doctor degree in 1934. He then did graduate work at the Harvard Law School where he received the Master of Laws degree in 1935. His law teaching career began in 1936 when he was appointed an Assistant Professor of Law at The University of Mississippi.

During the following ten years at Ole Miss, John Wade earned a national reputation as a legal scholar of significant stature. He wrote extensively and was published in most of the leading law reviews and journals. His reputation as a classroom teacher grew with each generation of law students, and he was deservedly known as one of the best

teachers of law in this country. In addition to his research, writing and teaching, John Wade was active in professional bar work and, in 1945, was elected President of the Junior Bar Section of the Mississippi Bar Association.

In 1942, he was awarded the S.J.D. degree by Harvard and in 1947, he was finally lured from Ole Miss by Vanderbilt. He was named Dean of that law school in 1952 and served in that capacity for twenty years. Those two decades of his deanship at Vanderbilt were years of distinguished achievement in which he built that institution into one of the great national law schools of this country. Upon his retirement as Dean in 1972, he was named a Distinguished Professor at Vanderbilt, and in 1976, was awarded a coveted Harvie Branscomb Professorship.

John Wade is generally regarded by his peers as one of the most influential legal writers of our time. He has published more than a hundred articles, essays, book reviews and other writings in major journals. He has published three major casebooks, one on restitution, one on legal methods, and in conjunction with William Prosser, the leading casebook in the field of torts. Additionally, he has been a member of the Advisory Committee on the *Restatement of Torts* since 1956, and has served as Reporter for that effort since 1970. His work on the *Restatement of Torts* is recognized as being instrumental in the reshaping of the principles of American tort law.

His strong personality and creative intelligence have also enabled him to influence the development and activities of many professional and charitable organizations. He has been a Commissioner on Uniform State Law since 1961, has been a member of the Board of Trustees of Southwestern at Memphis since 1966, was a member of the Executive Committee of the Association of American Law Schools in 1957, served as Chairman of the permanent Judicial Commission of the Presbyterian Church in the U.S., served for ten years as a member of the Council of the American Law Institute, has been a member of the Secretary of State's Advisory Committee on Private International Law since 1969, and was national Vice President and then national President of the Order of the Coif.

In both his professional and private life, John Wade has been one of the most influential and useful voices of our time. We are honored to have so distinguished a legal scholar present the 1977 Law Memorial Lectures.

Dean Parham H. Williams, Jr.
University of Mississippi School of Law

THE COMMUNICATIVE TORTS AND THE FIRST AMENDMENT

John W. Wade

Introduction

The law of torts is the epitome of social engineering. It considers the conflicting interests of the parties, then weighs them and balances them against each other and with the social interests of the public. Every rule of law involving tort liability or nonliability has been developed through this balancing process, and every case involves some aspect of balancing in applying the rules to the facts. Of course, the balancing process is not conducted completely afresh—de novo—for every case that comes before a court. A rule developed as a result of the balancing process is applicable in subsequent similar cases, although proper attention must always be given to the individual facts.

The law of torts has several techniques for doing this. In the law of negligence, for example, the balance is the magnitude of the risk against the utility of the conduct[1] and is expressed by saying that negligence is doing what a reasonable, prudent person would not do under the same or similar circumstances or in failing to do what that person would do. We call this a "standard." It is a marvelous invention allowing both uniformity of decisions and individualization of cases. Dean Pound called it a product of the maturity of law.[2] The same balancing takes place in connection with strict tort liability for abnormally dangerous activities. Indeed, the *Restatement* lists the factors to be balanced in making the determination whether strict liability should be imposed.[3]

When it comes to intentional torts, however, a different technique is used. The elements for a cause of action for a particular tort are established. When these requirements are met, the plaintiff has established a prima facie case on which he can recover. But the defendant can set up certain recognized privileges as a defense. Thus, for the tort of battery, the defendant could offer a privilege of self-defense, of protection of property, of administering discipline or others.[4] However, any privilege accorded a defendant may be exceeded or abused by him, and thus lost.

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[1] Restatement (Second) of Torts §§ 291-93 (1977).

[2] *See generally* 4 R. Pound, Jurisprudence 28 (1959); Pound, *The Administrative Application of Legal Standards*, 44 A.B.A. Rep. 445, 456 (1919).

[3] See Restatement (Second) of Torts §§ 519-20 (1977).

[4] *Id.* §§ 13, 63-166 (1965).

The torts to be discussed in these lectures are the communicative torts—those accomplished by the use of language. The primary one, and the most significant for our purposes, is defamation. Although there are other communicative torts, *e.g.*, invasion of the right of privacy, injurious falsehood, misrepresentation and assault, the greater portion of these lectures will be spent in discussing defamation.

I. DEVELOPMENTS THROUGH *New York Times Co. v. Sullivan*

A. The Common Law of Defamation

The tort of defamation grew up as two entirely independent torts—slander and libel. Its history is long and involved and was greatly distorted by the competing jurisdictions of the manorial, ecclesiastical, king's bench, common pleas and star chamber court systems. This history has adversely affected the product and produced some remarkable rigidities and technicalities.[5] There have been many calls for a complete overhaul and reform of the law of defamation, but attempts at reform have produced little in the way of results.[6]

Despite all of this, as it has developed over the years, the law of defamation has sought to attain a proper balancing of conflicting interests. On the one hand is the injured party's interest in his good reputation, in his honor and dignity, and in his equanimity. These are very important values, highly regarded in all civilizations and by all established religions. On the other hand is the freedom to speak as one pleases. Should the law put controls on the human tongue or on the pen? To complicate matters further, there are the interests of the "hearer" in hearing, learning, and knowing. Obviously, these conflicting interests are not confined to the personal interests of the plaintiff and the defendant, but extend to the much broader social interests in protecting reputation, honor, and freedom of speech.

How did the common law of defamation work out its calculus of interests? The tort of defamation covered liability for intentional conduct, for negligence, and for strict liability without fault. The technique that was adopted, however, was that developed for intentional torts—the prima facie case, to be refuted by privileges. The prima facie

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[5] On the history of defamation, *see generally* Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 40 L.Q. REV. 302 & 394 (1925); Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051 (1962); Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903); 4 *id.* 33 (1904). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111 (4th ed. 1971); W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 959 (6th ed. 1976).

[6] *See generally* COMMITTEE ON DEFAMATION, REPORT, CMND. NO. 5909 (1975) (recent British study).

case consisted of the publication to a third party of a communication regarding the plaintiff that was both defamatory and false. Although truth is the most obvious defense to a prima facie case, there have also been many privileges. First, there were the absolute privileges, allowing the defendant to speak without any fear of liability. The policy in favor of encouraging free speech prevailed entirely under the circumstances covered by these privileges. This protection is accorded to officials and participants in a trial, legislators, governmental executive officials, and husband and wife when conversing with each other. There is also a much wider group of qualified or conditional privileges. For example, a qualified privilege exists when the defendant is seeking to protect his own interest, the interest of a third person, a common interest of the speaker and others, or a public interest. Additionally, some special privileges exist, such as the reporter's privilege to report an official or public proceeding, the privilege of providing means of publication to one entitled to use it and the privilege of fair comment.[7] These privileges may be lost if they are exceeded or abused.

This is the system of balancing the conflicting interests under the law of defamation. It is complex and involved, but as developed over the years, it provides full opportunity to consider and balance the conflicting interests of the parties and the social interests. Again, it is not suggested that a court engages in a fresh, ad hoc balancing process in each case. Instead, it utilizes the rules of the law of defamation and accomplishes the balancing by applying the requirements for prima facie liability, the appropriate privileges and the rules for abuse of privilege. Although occasional references may be found,[8] the courts rarely mention the several interests as such or the balancing process itself.

My "summary" of the law of defamation is, of course, simplistic and quite inadequate. Adequate treatments of the law take one or two volumes of considerable size.

I referred earlier to calls for reform of the law of defamation and the ineffectiveness of attempts to respond. In 1964, a new reformer entered the field in the person of the Supreme Court of the United States. It has produced considerable change in the law, and its reform has been quite extensive. That action is the principal subject of these lectures. Before

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[7] *See generally* C. GATLEY, LIBEL AND SLANDER (7th ed. 1974); A. HANSON, LIBEL AND RELATED TORTS (1969); 1 F. HARPER & F. JAMES, THE LAW OF TORTS, ch. 5 (1956); W. PROSSER, *supra* note 5, at ch. 19; RESTATEMENT (SECOND) OF TORTS, chs. 24-27 (1977).

[8] *Compare* the contrasting views of Judge Taft in Post Publishing Co. v. Hallman, 59 F. 530 (6th Cir. 1893) *with* those of Justice Burch in Coleman v. Maclennan, 78 Kan. 711, 98 P. 281 (1908), on the issue of whether there should be a privilege for a false defamatory statement in criticizing a government official. The problem, discussed in Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875 (1949), finally culminated in New York Times Co. v. Sullivan, 376 U.S. 245 (1964).

these "reforms" are treated in detail, however, some consideration must be given to the historical development of the balancing process as it came about in the constitutional law of freedom of speech and of the press.

B. The First Amendment

The first amendment to the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." As worded, this provision applies only to the federal government. However, through a series of cases starting with *Gitlow v. New York*,[9] the Supreme Court held that the first amendment was incorporated into the fourteenth and therefore became applicable to the states.

The amendment's literal wording refers to Congress and "making a law," thus suggesting that the restriction will apply to statutes passed by a legislative branch of government. But the holdings have gradually made clear that the restriction applies not only to legislative provisions but also to the law created by judicial decisions and thus to the common law. Similarly, the express language speaks of "abridging" the freedoms and might well be interpreted as meaning a restrictive change in the condition of the law existing at the time the first amendment was adopted. Again, the interpretation has proved otherwise.

Consequently, the application of this provision to the common law of torts is not to be ascertained by seeking a literal interpretation or dictionary meaning of the particular words used. As a matter of fact, it was over 100 years before the problem arose in any important fashion. When the problem of the application of the free-speech provisions of the first amendment did begin to arise, there was no consensus on the meaning or theory of the provision or on the test for its application.

The traditional view has been that the first amendment has no application to defamation. As recently as 1942, in *Chaplinsky v. New Hampshire*,[10] Mr. Justice Murphy, in an oft-quoted statement, declared:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from

---

[9] 268 U.S. 652 (1925).

[10] 315 U.S. 568 (1942).

them is clearly outweighed by the social interests in order and morality.[11]

The precise holding in the case was that the states may control the use of fighting words. This holding is still essentially valid today, although a two-fold problem has arisen with its application: (1) how to identify the forbidden language narrowly enough, and (2) how to do it clearly enough so that the actor has no trouble in identifying it.[12] But the traditional view that control of defamation gives rise to no constitutional problems was abandoned in 1964, and while it is still possible that certain kinds of defamation will not be subject to the first amendment, the Supreme Court has not given an indication to this effect.

A second theory for determining the application of the first amendment is the "clear-and-present-danger" tort. It was strongly in vogue for a time but is now less in use. If used as the sole basis for determining the application of the first amendment, defamation would arguably have been left within the coverage.

In applying the due process clauses, the Supreme Court has frequently followed a balancing process of identifying and weighing the conflicting individual and social interests to determine the reasonableness of the regulation. Over the protests of some Justices, this approach has also been utilized in connection with the first amendment and, as the ensuing cases decided by the Supreme Court will show, it has proved to be the primary approach to reaching decisions. Although some judges have spoken on occasion about certain interests occupying a "preferred position," this is not a separate and distinct test.

In contrast with the balancing approach is the Black-Douglas absolutist view. As Mr. Justice Black put it, the words "no law" in the first amendment should be read literally. Any law imposing a penalty or liability on the use of language is therefore unconstitutional. All defamation laws are invalid without further consideration.[13] Although this absolutist view did not persuade other judges and was confined to Justices Black and Douglas, it did play a very important part as the constitutional law of defamation was developing, since these two Justices could always be counted on to vote with those wishing to impose the heaviest burden on the plaintiff. With their retirement, however, the view no longer has supporters on the bench and no longer influences

[11] *Id.* at 571-72 (footnotes omitted).

[12] There are numerous cases. *See, e.g.*, Lewis v. New Orleans, 415 U.S. 130 (1974). *See generally* Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.-C.L. L. REV. 1 (1974).

[13] See *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 548 (1962); Griswold, *Absolute Is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 UTAH L. REV. 167 (1963).

decisions. I would suggest that the literal view of Justice Black was much broader than he apparently realized. It would invalidate other torts such as misrepresentation or injurious falsehood and statutes such as those covering false advertising or false pretenses. Moreover, it would invalidate the law of contracts since it imposes legal duties and liabilities for the use of language. Indeed, what would happen to the Uniform Commercial Code or the Securities Exchange Acts under this view?

Still another theory of the first amendment, and one that has had considerable influence on the Court, is the self-government theory of Professor Alexander Meiklejohn. As he explains his theory, the importance of freedom of speech is not in the saying aspect but the hearing aspect. Under the Constitution the people have decided to govern themselves rather than be governed by others.

> And, in order to make that self-government a reality rather than an illusion, in order that it may become as wise and efficient as its responsibilities require, the judgment-making of the people must be self-educated in the ways of freedom. That is . . . the positive purpose to which the negative words of the First Amendment gave a constitutional expression.[14]

Therefore, any restrictions on the transmission of knowledge and ideas needed to produce "an informed citizenry required to make democratic self-government work" are unconstitutional. Except for private talk that has no relevance to the needs of self-government, the first amendment is absolute.[15] Dr. Meiklejohn's theory has strongly influenced a number of the Justices on the Supreme Court, particularly Mr. Justice Brennan.[16] While it has never been adopted in its entirety, it has substantially affected both the development and current state of the law.

In the final analysis, there has clearly been no consensus. On the whole, the Court has applied the balancing approach. This approach is adaptable. The other theories have affected its application, and elements of most of them are to be found in the development of the law to its present state. As the Supreme Court cases are traced, evidence that the balancing process of the law of torts and the constitutional balancing process jibe and work together may be discerned.[17]

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[14] A. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 263.

[15] See A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1948); Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41 (1974); A. Meiklejohn, *supra* note 14; D. Meiklejohn, *Public Speech in the Supreme Court Since* New York Times v. Sullivan, 26 SYRACUSE L. REV. 819 (1975).

[16] *See* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

[17] [T]here is . . . fascination in watching the centuries-old rigidities, com-

C. *A Preliminary Case*

In 1944, the first case squarely posing the issue of the relationship of the law of defamation to the Constitution came before the Supreme Court. *Sweeney v. Schenectady Union Publishing Co.*[18] was one of a number of suits brought by Congressman Sweeney against several newspapers publishing syndicated materials which accused him of opposing the appointment of an attorney as a federal judge solely because he was Jewish. The United States District Court for the Southern District of New York dismissed the complaint, and the case came before Judges Chase, Clark and Learned Hand in the Second Circuit. By a two-to-one vote, with Judge Chase writing the majority opinion and Judge Clark dissenting, the court of appeals reversed. Judge Chase's opinion makes much of how "right-thinking persons" would regard the plaintiff as a result of the publication and states that

> freedom of speech is, as it always has been, freedom to tell the truth and comment fairly upon facts and not a license to spread damaging falsehoods in the guise of news gathering and its dissemination.[19]

Judge Clark, however, felt that an allegation of special damages was necessary.

> [I]n our present world we must not take the naive view that what ought to be is, and that whoever suggests the contrary is a slanderer; for if we do so, we shut off all healthy criticism of prejudice, and allow bigotry full scope to act with impunity. Even more dangerous is the rationale of the decision that a comment leading an appreciable number of readers to hate or hold in contempt the public official commented on is libelous per se . . . .
>
> I do not think it an adequate answer to such a threat against public comment, which seems to me necessary if democratic processes are to function, to say that it applies only to false statements. For this is comment and inference . . . and hence not a matter of explicit proof or disproof.[20]

The Supreme Court granted certiorari[21] and subsequently granted per-

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> plexities, and elegancies of the Anglo-American law of defamation collide with a rapidly developing corner of American constitutional law. The one certain prediction I can make is that judicial review of the common law of defamation, launched by the *New York Times* case, is to be with us for a time to come.

Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 269.

[18] 122 F.2d 288 (2d Cir. 1941).

[19] *Id.* at 291.

[20] *Id.* at 291-92 (Clark, J., dissenting).

[21] 314 U.S. 605 (1941).

mission to numerous groups to file briefs amici curiae. Though the only ostensible question was whether the holding was in accord with the law of New York,[22] it seems obvious from the quotations above that constitutional questions must have been considered by the Supreme Court. There was no Supreme Court decision or opinion. A per curiam memorandum read simply: "The judgment is affirmed by an equally divided court."[23] Consequently, we have no way of knowing what the Justices at that time thought or said, and the Supreme Court still has not established a constitutional test for determining the defamatory character of a communication. The episode, however, is prophetic of the division of the Court in subsequent cases.[24]

Between 1941 and 1963 the Supreme Court took no defamation cases although there were a number of cases involving prosecutions under criminal statutes involving the use of language. In the important ones, wide splits developed in the Court.[25] They did not, however, bear directly on the issue of civil liability for defamatory language.

D. New York Times Co. v. Sullivan

In the late Fifties and early Sixties, there developed a new phenomenon in the law—the use of a defamation suit to suppress expressions of opinion and views on public issues. The suits were usually against newspapers for the purpose of obtaining a heavy money judgment which would act as a "blackjack" to prevent the papers from publishing unpopular and unwanted "news." The idea grew out of the racial turmoil of the era and the strong emotions involved. The effect, of course, was a direct attack upon the freedom of the press. The Supreme Court felt that it had to act and, on January 3, 1963, granted certiorari in the case of *New York Times Co. v. Sullivan*.[26]

The cause of action arose out of an editorial advertisement appearing in the *New York Times*, entitled "Heed Their Rising Voices." It was placed by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South" for the dual purpose of expressing

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[22] Erie R.R. v. Tompkins, 304 U.S. 64 (1938), had been decided shortly before.

[23] 316 U.S. 642 (1942).

[24] In an opinion by Judge Learned Hand joined by Judges Clark and Swan, the Second Circuit subsequently changed its position from the test based on right-thinking people, but held that a cause of action was stated under similar circumstances. Grant v. Reader's Digest Ass'n, Inc., 151 F.2d 733 (2d Cir. 1945). The Supreme Court denied certiorari. 326 U.S. 797 (1946).

[25] Two leading cases in which there were a number of opinions were Dennis v. United States, 341 U.S. 494 (1951) (Smith Act violations), and Beauharnais v. Illinois, 343 U.S. 250 (1952) (group libel).

[26] 371 U.S. 946 (1963).

a point of view and soliciting contributions. One paragraph of the ad referred to a student demonstration at Alabama State College in Montgomery. The description had some minor inaccuracies. Sullivan, the police commissioner in Montgomery, brought a libel action seeking $500,000 damages against the *Times* and four signers of the advertisement who were domiciled in Alabama. Sullivan had formally asked for a retraction, but when the *Times* requested an indication of how the statements reflected on him, he filed suit without replying. Separate suits by other city and state officials, all unnamed in the ad, requested damages totalling more than $5 million. The judge in the trial had stated in another trial that the fourteenth amendment had "no standing whatever" in his court, that segregated seating would be required in the courtroom and that "white man's justice" would be administered. The jury returned a verdict for the full amount requested.[27] The Supreme Court of Alabama affirmed on appeal,[28] using the great part of the opinion to discuss whether there was jurisdiction over the *Times*. It gave little attention to the technical questions of the law of defamation or the measure of damages, and on the matter of constitutional law, stated simply, "The First Amendment of the U.S. Constitution does not protect libellous statements."[29] It makes interesting speculation to consider what would have happened if the Alabama Supreme Court had reversed the case or granted a very substantial remittitur. Would the Supreme Court have denied certiorari? Would the entire constitutional law of defamation never have come into being or perhaps have been delayed?

But the decision was sustained. It was a portent of more to come—a means of silencing the press from publishing things that certain persons did not want the people to see. The Supreme Court had to act. It could have reversed the case by finding that the state court did not have jurisdiction over the *Times* or by finding that the trial violated principles of procedural due process, but these would have been temporary palliatives. Such obstacles could have been eliminated in subsequent trials and the "blackjack effect" would still be available.

Instead, the Court "bit the bullet" and held categorically that the

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[27] For a helpful treatment of the background and facts in the case, see Pierce, *The Anatomy of an Historic Decision:* New York Times Co. v. Sullivan, 43 N.C.L. Rev. 315 (1965).

[28] New York Times Co. v. Sullivan, 273 Ala. 656, 144 So. 2d 25 (1962), *rev'd*, 376 U.S. 254 (1964).

[29] As support for this conclusion, the court cited Konigsberg v. State Bar of California, 366 U.S. 36 (1961); Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961); Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Near v. Minnesota, 283 U.S. 697 (1931). In its opinion, 376 U.S. at 268, n.6, the United States Supreme Court added Roth v. United States, 354 U.S. 476 (1957) and Pennekamp v. Florida, 328 U.S. 331 (1946).

imposition of liability in this case constituted a violation of the free-speech clauses[30] of the first amendment. The decision of the Supreme Court and the opinion of Mr. Justice Brennan in the case broke new ground and became a landmark for the future.

Mr. Justice Brennan's opinion is long and closely-reasoned, covering thirty-seven pages in the official reports. It begins by refuting some "grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny." First, to the argument that no state action was involved, the response was that it was state action even though the state courts applied the common law in a civil action. Second, to the argument that commercial speech is outside the scope of the treatment, the response was that this "advertisement" was "editorial" in nature and much more than mere commercial speech. Third, to the argument that defamation is not given first amendment protection the response was that the label is not controlling: "[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by the standards that satisfy the First Amendment."[31]

In addition, Justice Brennan said, this was not an ordinary defamation action of the kind referred to in the earlier Supreme Court opinions. This was an action by a governmental official suing for criticism of his official conduct. Even the common law recognizes a privilege of fair comment in this situation. We must, he said,

> consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[32]

That commitment is recognized in the first amendment and embodied in it. It is fortified by the experience under the Sedition Act in the early days of the republic. Though that Act never formally came before the Court to have its constitutionality tested, "the attack upon its validity has carried the day in the court of history" and there is a "broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."[33] Indeed, the controversy over the Sedition Act "first crystallized

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[30] I mention free speech as well as free press because suit was brought not solely against the New York Times, but also against four Alabama ministers who signed the advertisement, in a case ultimately combined with the *Times* case and decided in the same opinion.

[31] New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

[32] *Id.* at 270.

[33] *Id.* at 276.

a national awareness of the central meaning of the First Amendment."[34]

Against this backdrop, Justice Brennan outlined the constitutional law of defamation: (1) the protection that the first amendment affords to criticism of public officials is not forfeited because of its falsity in fact; erroneous statements and exaggerations are inevitable in free debate, and they must be given protection to provide the "breathing space" required to insure freedom of expression; (2) neither is the protection forfeited by the defamatory nature of the criticism and the injury that it may do to the official's reputation; (3) the combination of falsity and defamatory content is insufficient "to remove the constitutional shield"; and (4) a state rule imposing liability is not saved by "its allowance of the defense of truth." The imposition of liability for false and defamatory statements means that much more than false and defamatory statements will be deterred. Fear of heavy damage awards produces self-censorship.

> [W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone."[35]

The stage was thus set for the conclusion that:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[36]

What is more, the "constitutional standard" demands that the showing of knowledge or reckless disregard be with "convincing clarity," and the Supreme Court will "in proper cases review the evidence to make certain that those principles have been constitutionally applied."[37]

Moreover, it is appropriate to impose this requirement on a government official as a plaintiff in a libel action because it is an analogue to

> the protection accorded [him] when he is sued for libel by a private citizen . . . . The reason for the official privilege is said to be that the threat of damage suits would otherwise "inhibit the fearless, vigorous, and effective administrations of policies of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the

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[34] *Id.* at 273.
[35] *Id.* at 279 (citation omitted).
[36] *Id.* at 279-80.
[37] *Id.* at 285-286.

> unflinching discharge of their duties." . . . Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer.[38]

Finally, the Constitution also requires that the evidence adequately support the colloquium or the reference to the plaintiff in the defamatory statement. Whether the evidence does constitutionally support the allegation that the statement was "of and concerning" the plaintiff is subject to review by the Supreme Court.[39]

Applying these standards, the Court reached the conclusion that the evidence was constitutionally inadequate to support a finding that either the *Times* or the individual defendants acted in reckless disregard as to the falsity of the relevant portions of the advertisement or a finding that the language referred to the plaintiff. The case was therefore reversed.

Justices Black, Douglas and Goldberg specially concurred in two opinions in which they argued that there should be an "absolute immunity" in situations involving criticism of the public conduct of a government official and that decisions on the state of mind of the defendant should not be left to the jury.

From this review of the majority opinion, it is very clear that the Court was strongly influenced by the Meiklejohn theory of self-government. However, it is equally clear that instead of adopting the theory entirely the opinion also resorted to the process of balancing conflicting interests in determining the exact nature of the principles to be applied. Indeed, the Court left a number of terms to be defined more completely and raised many problems to be settled by subsequent decisions.[40]

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[38] *Id.* at 282, *quoting* Barr v. Matteo, 360 U.S. 564, 571 (1959) (established an absolute privilege for federal officials). It is perhaps ironic that Justice Brennan dissented in *Barr*. Two arguments offered in later cases for imposing the constitutional requirement against a public official, or public figure, as plaintiff were (1) that he voluntarily subjected himself to the criticism by accepting the position, and (2) that because of his position he would have a much better opportunity to respond, thus utilizing a form of self help. But Mr. Justice Brennan abandoned all of these arguments in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), when he sought to extend the *New York Times* principle beyond public plaintiffs to any "matter of public or general interest."

[39] 376 U.S. at 288.

[40] For an exposition of the law laid down in the case, see RESTATEMENT (SECOND) OF TORTS § 580A (1977). The case is discussed at length in a number of articles. *See generally* Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581 (1964); Pierce, *supra* note 27. The best summary of the views of Mr. Justice Brennan has been prepared by himself and appears as his dissenting opinion in Time, Inc. v. Firestone, 424 U.S. 448, 471 (1976).

II. Developments Since *New York Times Co. v. Sullivan*

The essence of the holding in the *New York Times* case was that if a public official sues for libel, he will be required to prove, with clear and convincing evidence, that the defendant had knowledge of the falsity of the defamatory statement or acted with reckless disregard as to its truth or falsity. Additionally, the reference to the plaintiff, the so-called "colloquium," must be proved with evidence that is "constitutionally sufficient." Refinements were, of course, needed to clarify these terms and answer the question of how far this process would extend.

A. Refinements and Definitions

The first case was *Garrison v. Louisiana*.[41] That was "Big Jim" Garrison's first occasion to attain fame; he has gone much further since then. While he was District Attorney in the parish in New Orleans, "Big Jim" was having some very critical things to say about the trial judges there. The judges were unhappy about it and arranged for him to be prosecuted for criminal libel. The Supreme Court quickly reached the conclusion that a criminal prosecution, as distinguished from a civil action for libel, might also be unconstitutional. Again, Mr. Justice Brennan authored the opinion. As previously noted, the explanation of the application of the first amendment was to the effect that we cannot have a penalty, liability or responsibility imposed upon individuals who criticize the government or governmental officials. To his remark in *New York Times Co. v. Sullivan* about the "profound national commitment [to] uninhibited, robust and wide-open" debate on public issues, Justice Brennan added this remark in *Garrison*: "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."[42] Adherence to the Meiklejohn theory of freedom of speech is readily apparent. There was thus a deliberate holding that the criminal libel statutes were unconstitutional.

Justice Brennan also took time to say one more thing that rounded out his previous exposition in *New York Times Co. v. Sullivan*. A "calculated falsehood" is not subject to the protection of the free-speech or free-press provisions. Specifically:

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a

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[41] 379 U.S. 64 (1964).

[42] *Id.* at 74-75.

> public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even to topple an administration.[43]

Thus, if the statement is an intentional falsehood, then liability may be imposed. This was the balancing. It should be remembered here that the argument of Professor Meiklejohn and the position of Justices Black and Douglas was to the effect that if the statement was a criticism of public officials there ought to be no liability at all. But that philosophy would have created an absolute immunity and was not the holding here.

The next case is *Henry v. Collins*,[44] arising out of the Clarksdale, Mississippi, area. A man who was being prosecuted issued a public statement charging the prosecutors with engaging in a "diabolical plot" against him. The trial court, instructing the jury that there had to be proof of malice, defined malice in the common law sense as ill will or intent to injure. In a per curiam opinion, the Supreme Court held that what it had called "actual malice" in *New York Times* was a different thing. Instead of ill will, the Supreme Court's "actual malice" meant knowing falsehood or reckless disregard as to truth or falsity. The Court has consistently taken that position in subsequent cases. Right at that moment, I think it should have admitted that it made a mistake in naming what it established in *New York Times* as "malice." It was not that at all, and the Court should call it something else. In recent cases, the members of the Court have been somewhat inclined to eschew the term and not use it as much, but it is still to be found in even the late opinions.

Then came *Rosenblatt v. Baer*,[45] which presented the question of who is a public official. The Court held that a public official is someone whose position "has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualification and performance of all government employees."[46] The person need not be a policymaker, but he must have some real responsibility in carrying on the government. The Court added that this question of who is a public official is one of law, depending upon the facts, and it is also a federal question. Thus, it declined to allow the states to set up their own definitions as to who is a public official. Whether the plaintiff is a local

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[43] *Id.* at 75.
[44] 380 U.S. 356 (1965).
[45] 383 U.S. 75 (1965).
[46] *Id.* at 86.

official, a state official or a federal official, the question of whether he is the type that must meet the *New York Times* standard is always a federal quuestion determined according to federal law.

As he did in many other cases, Mr. Justice Black took a different position on the basis of his theory that "libel laws are abridgments of speech and press and therefore are barred in both federal and state courts by the First and Fourteenth Amendments."[47] He called attention to the high money judgments and found that the requirement of "malice" is no protection against them.

Mr. Justice Stewart, concurring with the majority, had a comment that might have been noted when I spoke of the nature of the plaintiff's interests:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.[48]

Accordingly, the attitude is that this is an interest that must be given careful consideration in the balancing process.

The next case, slightly out of chronological order, is *St. Amant v. Thompson*,[49] another Louisiana case. A man running for political office made a political speech on television in which he quoted language from a third person whom he had interviewed. The quotation libeled the plaintiff, who was not a candidate. The Court thus faced the question of what is meant by "reckless disregard." The defendant had quoted the statement without checking its accuracy in any respect. Was his conduct in reckless disregard as to the truth? The Court held that the term means that an individual must have a "high awareness" of the likelihood that the statement was false. Later, however, it stated that the individual must have had "serious doubts" as to the truth of the statement.[50] This definition was adopted despite the admission by Mr. Justice White in his opinion that this test

> puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defen-

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[47] *Id.* at 95 (Black, J., concurring in part, dissenting in part).

[48] *Id.* at 92 (Stewart, J., concurring).

[49] 390 U.S. 727 (1968).

[50] *Id.* at 731.

> dant's testimony that he published the statement in good faith and unaware of its probable falsity.[51]

Here, I think, the Court went down a lane that will cause it trouble and that it may later want to change somewhat. What it has done in defining reckless disregard in this fashion is set up a subjective test that is concerned with what is in the mind of a defendant at the time. Did he actually have serious doubts? Who can tell? The proof must be circumstantial, and there is no objective standard to check the decision against. The Court, I am sure, would have done a good deal better if it had adopted an objective test in terms of the defendant's conduct in this connection. Mr. Justice Fortas said as much in the case. He called attention to the fact that the defendant had made no investigation whatsoever; this use of the libel was "casual, careless, callous." Justice Fortas was not concerned with whether there was a careful investigation. Rather, when the defamatory story originated under these circumstances and from a source whose credibility the defendant knew nothing about, he should have done some checking.[52] This conduct approach would have constituted a better standard.

B. False-Light Privacy

These four cases, then, have been concerned with defining the terms. There was nothing new in them in the sense of expansion of the *New York Times* principle—they were filling in the details. But the next case, *Time, Inc. v. Hill*,[53] raised a completely new problem and was the next substantial advance by the Court. The *Time* case was not a defamation case in the strict sense of the term but a right-of-privacy case. The law of right of privacy, as it has recently developed, applies not only to publicity given to highly embarrassing private facts, but also to publicity given to purported facts that actually are not true, and while not necessarily defamatory in nature, are nevertheless embarrassing and disturbing to the individual. Under the facts in the *Time* case, there had been an earlier occurrence involving escaped convicts who, as they were trying to make good their escape, came into a home for approximately forty-eight hours, keeping the family captive. The experience of the family with the convicts in that factual situation gave rise to a novel and then to a play. The play, called *The Desperate Hours*, was later made into a movie. *Life* magazine carried a news display on the opening of the play with pictures of the actors and the family. The play was fictitious

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[51] *Id.*

[52] *Id.* at 734-35.

[53] 385 U.S. 374 (1967).

in many respects, but neither it nor the novel had purported to be entirely true. The idea had merely formed the basis of the plot, and changes were made in the details. Although these changes were not libelous to the family, it was embarrassing to them to have the implication that all of the details in the play were true. There were indications that the staff of *Life* knew these implications of truth were erroneous and that one of the superior editors changed the layout to make it appear that the play was an accurate depiction of what happened. The New York court allowed recovery and *Life* appealed.

The question before the Court was what kind of requirement should be imposed upon the plaintiffs. These were false statements. Should the Court use the *New York Times* standard of knowledge or reckless disregard, or should it use a different one in the case of a plaintiff who was not a public official but merely a private person? Mr. Justice Harlan wrote a very well-reasoned dissenting opinion on this. In his view, false statements have no inherent value entitling them to the protection of the first amendment. The Court's ruling in *New York Times* had not said that false statements are valuable, but that some leeway must be given in the uttering of statements because some false statements are inevitable in free debate. The question was how much leeway. In this case, Justice Harlan felt the same kind of protection accorded a person criticizing a public official was not needed. There was no need for so wide a leeway. Moreover, the states should be free to encourage the use of reasonable care in investigating the accuracy of the publication. Consequently, the Court should find liability if the defendant was negligent in failing to check the truth of the publication. In other words, this is putting a somewhat greater burden on the defendant to use reasonable care to check the truth or falsity of the statement when it has nothing to do with the government or the way in which an official is performing his duty. But no one joined Justice Harlan's opinion. Mr. Justice Fortas dissented in a separate opinion, taking the position that use of the standard of reckless disregard places an almost insuperable obstacle on the plaintiff—if that were the result the Court wanted, it would do better to go ahead and say so. He said again that this was not a mere negligent error in making the investigation but a failure to investigate at all.

The majority opinion, again written by Mr. Justice Brennan, held that the knowledge-or-reckless-disregard standard of *New York Times* applies to these false-light, right-of-privacy cases on the basis that it is necessary to have adequate "breathing room" and that liability could be imposed only if the defendant uttered a "calculated falsehood" as defined in *Garrison*. Erroneous statements would be inevitable, and the use of a negligence standard would create the "impossible burden" of

guessing how a jury would decide. This, then, was a step broadening rather substantially the application of the *New York Times* rule.[54]

C. *Public Figures*

Next came the joint cases, *Curtis Publishing Company v. Butts* and *Associated Press v. Walker*,[55] where the Court extended the *New York Times* standard beyond public officials to people who are characterized as "public figures." The Court held that both Coach Wally Butts and General Edwin Walker were public figures, making it necessary for them as plaintiffs seeking recovery, to meet the standard of knowledge or reckless disregard. It should be remembered that the Court had held in *New York Times* that the question of whether there was reckless disregard was a constitutional question, and that it would be ready to review those facts de novo to decide whether there might be recovery or not. The Court ruled in *Walker* that the action of the Associated Press was not in reckless disregard. They had a reporter on the scene who filed the report. If the report was erroneous that was not the significant feature; the question was whether there was reckless disregard or serious doubt. The case was reversed and decided for the defendant on that basis. In *Butts*, testimony indicated that the *Saturday Evening Post* knew that there was a very real question as to whether the article was correct and that the editors had serious doubts about the matter. There was testimony, for example, that the *Post* was financially in trouble, that it needed publicity and that one of its editors had said that what it needed was a "good juicy libel case against us." They found that they had one and that they had to pay for it. The Court held that the finding of the court below for the plaintiff might stand.

In *Time, Inc. v. Hill*, the Justices had split in a five-to-four decision. When it came to *Butts*, the Justices split like the fingers of my hand. Only one Justice was right on everything—Chief Justice Warren—and no one else concurred in his opinion in full. Even though he was all alone, his was the "majority" opinion that was right both on the reasons and on the results. The other Justices spread out in every direction. Mr. Justice Harlan dissented again, and three Justices joined him. If you look in the reports, you will find his opinion set forth as being the one that lays down the rule. It is the one that the syllabi are taken from, and every one of them is wrong. The case confused the reporters so much

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[54] More recent Supreme Court cases treating the right of privacy will be discussed in section III., *infra*. For developments between those cases and Time, Inc. v. Hill, see Pember & Teeter, *Privacy and the Press Since* Time, Inc. v. Hill, 50 WASH. L. REV. 57 (1974).

[55] 388 U.S. 130 (1967).

that they didn't know how to handle it. Professor Harry Kalven wrote an article on the case shortly after it was decided which he subtitled *You Can't Tell the Players Without a Scorecard.*[56] It struck the Justices on the Court as being amusing, too. Two or three of them have referred to it on occasion. Somehow, whenever they refer to it, they put it in a footnote, but at least they can still poke a little fun at themselves.

Mr. Justice Harlan had not succeeded in getting any real support for his opinion in *Hill*. There he had argued for a negligence standard of what a reasonable, prudent person would do. In this case, he changed his standard a little to require "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[57] To me, this would be "gross negligence" under tort terminology. By making that change he got three Justices to join him, and he almost had a majority. These Justices were differing very sharply with each other, and the debate between them was whether the standard of conduct should be reckless disregard or highly unreasonable conduct. I am not sure that anyone can tell the essential differences between those two tests. Was this worth arguing about? Would the fine distinctions be administratively feasible?

D. Miscellaneous Developments

Next, there arose a group of cases that made no substantial changes in the development of the law. *Greenbelt Cooperative Publishing Association v. Bresler*[58] had more significance than we realized at the time. This case involved the reporter's privilege to report on an official or public proceeding. The suit originated out of a debate in a city council meeting on a proposal presented by the plaintiff, who wanted to obtain a special zoning exception in his behalf. The council was not ready to give it to him. The plaintiff also owned some land that the city wanted for the purpose of constructing a school building, so he openly said to the city, "You give me what I want and I'll give you what you want." One of the members of the city council rose in the meeting and called that blackmail. Actual blackmail is a felony. But this was not really blackmail—this was just being called blackmail. The reporter's common law privilege permitted the newspaper to report the statement as having been said in the official proceeding, whether the reporter thought it was true or not. This was a fair report because the news story did indicate the whole set of facts behind the "charge." That could have

[56] Kalven, *supra* note 17, at 275. The article contains a good analysis of these cases.
[57] 388 U.S. at 155.
[58] 398 U.S. 6 (1970).

been the end of it, but the newspaper itself also called this conduct blackmail. This created a different problem. The Court held that there was still no liability because it was apparent from the story that the newspaper was not actually accusing the plaintiff of being guilty of the crime of blackmail. This is getting close to the common law doctrine of fair comment. The significance of this case is substantial although it was not realized at the time the case was decided.

Monitor Patriot Co. v. Roy[59] and *Ocala Star Banner Co. v. Damron*,[60] involved charges of criminal conduct against candidates for office, and the Court held in each case that a criminal charge leveled against a public officer or a candidate for office is always relevant to his fitness to serve as an officer, so that the *New York Times* standard applies. This approach carries the implication that there may be some things about a public official that are entirely private and have no relevance to his role as a public officer, but that was not true in these cases. It may well have been that the charges were false. Indeed, in one of the cases it was clear that the newspaper made a mistake, and the man's brother had actually committed the crime. The Court found, however, that there was no proof of reckless disregard as to the truth.

Time, Inc. v. Pape[61] again involved the matter of the reporter's privilege. *Time* had summarized a printed report issued by the Civil Rights Commission. The report discussed certain criminal cases, taking the purported facts out of the indictments rather than the court findings, and *Time* reported them as being facts without putting the word "alleged" in front of them. The Court held that the mere failure to use the word "alleged" was not enough to take the case outside the scope of the so-called constitutional privilege. Since the Commission's report was ambiguous, it was sufficient if *Time* adopted any interpretation of several possible rational interpretations even though it proved to be a misconception. This case should be borne in mind for later consideration with the last case the Supreme Court has taken up, *Time, Inc. v. Firestone*.[62]

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[59] 401 U.S. 265 (1971).

[60] 401 U.S. 295 (1971).

[61] 401 U.S. 279 (1971).

[62] 424 U.S. 448 (1976). Three other cases not making any particularly significant contribution to the development of the law include Pickering v. Board of Educ., 391 U.S. 563 (1968) (no reckless disregard was found; public school teacher was improperly dismissed for making a false charge); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967) (evidence of reckless disregard as to falsity not sufficient to go to jury); Linn v. United Plant Workers of America, 383 U.S. 53 (1966) (state remedy for defamation in course of labor organization campaign is available and not preempted by federal acts).

E. Matters of Public or General Interest

This brings us then to *Rosenbloom v. Metromedia, Inc.*,[63] where the Court again split drastically. Plaintiff had been involved in a suit raising the question of whether he was engaged in selling obscene publications. Metromedia, in a series of radio news broadcasts about the suit, used terms including "smut literature," "girlie-book peddlers" and "pornography." When the plaintiff protested, Metromedia did not correct its statements immediately. Plaintiff was neither a public official nor a public figure. The question presented was what kind of standard should apply to such a plaintiff. What did he have to prove? In a plurality opinion by Mr. Justice Brennan, the Court held that the *New York Times* standard applied to the plaintiff, or rather, to the particular situation. It concluded that a determination as to the standard does not depend on who the plaintiff is, but on the nature of the circumstances, and the real question is whether the event or occurrence is a matter of public or general interest. The impending arrest of an individual on a charge of the sort involved in *Metromedia* is a matter of public or general interest. This is something that is of concern to the public, and that it may properly consider. This opinion brought the position of the Court very close to the Meiklejohn interpretation. As noted previously, Mr. Justice Brennan, in a plurality opinion of three, held that the *New York Times* standard applied. Two other Justices agreed with the end result: Mr. Justice Black thought that there should be no liability at all for defamation; Mr. Justice White thought the fact that this particular set of circumstances involved public officials, the police who made the arrest, was enough.

There was strong dissent in opinions by Mr. Justice Harlan and Mr. Justice Marshall. Both argued that this new approach would not work and that the Court should lay down objective standards that could be more easily applied. They specifically suggested two standards which the Court could adopt. First, the states could be forbidden to impose strict liability and forced to require at least negligence; second, the plaintiff could be required to have suffered actual harm, thus enabling the court to control the damages. The dissenters argued that the majority approach would not work because the expression "matter of public or general interest" is one that cannot be adequately defined. There would be so much uncertainty that the rule would be of no aid to the press or others, since no one could know what result would be reached in a particular case. Cases would be continuously appealed to the Supreme Court, swamping it with libel suits. A better approach, according

[63] 403 U.S. 29 (1971).

to the dissenters, is a "generally applicable solution" that is clear enough for the lower courts to apply properly.[64]

At the time *Metromedia* was decided the second *Restatement of Torts* was nearing completion, and the American Law Institute had waited as long as it could to cover the chapters on defamation, stating what the law is in accordance with its normal procedure. We in the ALI worked on the matter and tried to define "public or general interest." The sections set out a little more than the Supreme Court decisions, but not much more because it was complete speculation. The presentation went before the whole of the Institute, and as Reporter, I was involved in trying to defend it on the floor against those who criticized and questioned it. The draft was finally passed by the American Law Institute in its May meeting.[65] A little over a month later, the *Gertz* case repudiated *Metromedia*, and it was back to the drawing board again.

F. The Gertz *Case*

All these cases ultimately led to *Gertz v. Robert Welch, Inc.*,[66] which is the landmark case now. The most important cases besides *New York Times* have been *Time, Inc. v. Hill*, the *Butts* case and *Metromedia*, but *New York Times* and *Gertz* are distinctly the most significant. *Gertz* involved a factual situation rather similar to that involved in *Metromedia*. The plaintiff, a lawyer, had been held not to be a public figure. The defendant, owner of the John Birch Society publication, *American Opinion*, published an article about the plaintiff containing some admittedly false and defamatory statements about him. The article was written by a freelancer whom the publication printed with some frequency. Perhaps a court might have properly found reckless disregard if it had reached this point, but instead the holding repudiated *Metromedia*. I used "repudiated" instead of "overruled" because *Metromedia* involved a plurality opinion and did not necessarily lay down a rule that was final and completely binding. The Supreme Court simply declined to follow it in *Gertz*.

The majority opinion was written by Mr. Justice Powell. Starting by saying that the Court was again seeking "to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment,"[67] he wrote a rather

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[64] For a good analysis of the opinion in *Metromedia* and a "line-up" of how the justices stood on particular issues, see Keeton, *Some Implications of the Constitutional Privilege to Defame*, 25 VAND. L. REV. 59 (1972).

[65] That draft, now of course outdated, appeared as RESTATEMENT (SECOND) OF TORTS §§ 581A & 581B (Tent. Draft No. 20, 1974).

[66] 418 U.S. 323 (1974).

[67] *Id.* at 325.

lengthy opinion, covering the issues thoroughly. The case lays down several new principles. Of any opinions in the general area, this is the one to read because from it the current state of the law really comes into existence. On the standard to be applied, the Court held that the standard of knowing or reckless disregard as to falsity still applies in the case of public officials and public figures. However, a determination as to what is a matter of public or general interest or what information is relevant to self-government—the *Metromedia* test—is, according to the Court, one for which no adequate guidelines could be provided.

If I may interject a comment here, I have referred to Professor Alexander Meiklejohn and his self-government theory, but I have not effectively defined it. The general idea is fairly clear, but one of the reasons I have not effectively defined the theory is that Dr. Meiklejohn himself never expressed it in words that could be quoted as such. The idea is an excellent one, but stating it in terms that can be applied easily and with facility is something that neither he nor anyone else has worked out. The general idea behind the theory is that the public should be stimulated to debate matters of real public concern affecting self-government and influencing the opinions of other people on matters of public interest. But what are matters of public interest? How does one tell except on a subjective basis? The Court has now backed away from that issue. Mr. Justice Powell had a rather unusual way of saying it: "We doubt the wisdom of committing this task to the conscience of judges."[68] That is one way of saying "we do not think we can do it."

Instead, the *Gertz* Court promulgated a different standard for private plaintiffs as distinguished from public plaintiffs. Justice Powell was very careful in wording the standard.

> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.[69]

In other words, it is unconstitutional to impose liability when the defendant was not at fault at all in regard to the falsity of the statement. The Court does not, however, impose the knowledge-or-reckless-disregard

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[68] *Id.* at 346. Earlier, Justice Powell had referred to the theoretical argument that the balance between the conflicting interests "might be struck on a case-by-case basis" and responded that

> this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.

Id. at 343-44.

[69] *Id.* at 347.

test as a constitutional requirement in suits by private plaintiffs. That is an "extremely powerful antidote" which "exacts a high price" from the victim. Of course, what is implied is that a state may use negligence or, if it wishes, a higher standard.

The *Gertz* opinion also accepts the other argument of Justices Harlan and Marshall in the *Metromedia* case by providing that the plaintiff can recover only for actual harm, and that harm must be proved. The interest of the state is in compensating for the harm actually incurred. It cannot give more. This requirement eliminates the old idea of general or presumed damages.[70] The distinction has long been drawn between slander per se and ordinary slander. Under slander per se, the plaintiff did not have to prove special damages. It was assumed that a communication of this nature was so defamatory that it was bound to injure someone, and the jury could assess the amount. That assumption is eliminated now. *Gertz* holds that a plaintiff must give proof of damage to reputation, although the Court has said that he does not have to offer it in terms of monetary figures. His recovery is not limited to pecuniary loss. The plaintiff can take the stand and testify as to the injury to his reputation, and that may well be enough. I think what the Court was doing in this case was providing the trial or appellate court with an opportunity to find that the damages were entirely too high and cut them down, thereby limiting damages to reasonable amounts. This development should be watched to see if it continues.

Another significant aspect of *Gertz* lies in a remark in the case about there being no such thing as a false idea.[71] This remark, combined with the holding in the *Greenbelt* case and another case decided the same day as *Gertz*,[72] indicates that liability cannot be constitutionally

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[70] *Id.* at 348-50.

[71] We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust and wide-open" debate on public issues.

Id. at 339-40.

[72] Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974). In a labor dispute, defendants had called plaintiffs "scabs" and had published a well-known "definition" of a scab, including the comment that he is a "traitor to his God, his country, to his family and his class." The Court held that the *New York Times* standard applied under federal labor laws and added:

> Before the test of reckless or knowing falsity can be met, there must be a false statement of fact . . . . But, in our view, the only false statement in the disputed publication is the claim that appellees were scabs, that is, that they had refused to join the union.

imposed upon any individual for the expression of a mere opinion as distinguished from an untrue statement of fact. This approach utilizes and carries further the old common law doctrine of fair comment. It is necessary, however, to give proper meaning to the expression, "mere opinion." If the expression of an opinion carries with it the implication that there are existing, undisclosed facts that justify the opinion, then there is an implied allegation of facts that may be false and defamatory. If all of the facts are known, however, and all the defendant is doing is characterizing them, his statement is not actionable. That was exactly the situation in *Greenbelt*, the "blackmail case." The newspaper in the case indicated all the facts concerning the plaintiff's conduct, and having done that, called the conduct blackmail. But that is all it did—there were no implications of additional facts. That is the essence of the holding in the *Gertz* case combined with the others.[73]

Finally, the opinion discussed the concept of a public figure. It explained that there are two kinds: (1) a person who has attained "pervasive fame or notoriety" and so has become a public figure for all purposes, and (2) a person who participates in a "public controversy" and becomes a public figure for a limited range of issues.[74] Mr. Gertz was held to come within neither of these meanings, and it seems apparent that the Court has narrowed the scope of the concept as it was set forth in *Butts*. I may note also that the definition given here includes a number of rather vague terms not immediately reducible to objective standards and subject in some measure to objections similar to those pointed out by the Court in discarding the holding in *Metromedia*.

The fact that there were six opinions for nine judges in *Gertz* at first suggests that the Court is still sharply divided and that the holding is of dubious authority for the future. But analysis contradicts this impression. Five judges concurred in the majority opinion, with Mr. Justice Blackmun concurring to ensure a majority. Mr. Justice Brennan, who had written most of the earlier important opinions, continued to follow the position he espoused in them, especially in *Metromedia*, but he had no concurrences this time. Mr. Justice Douglas continued to follow the Black-Douglas view of an absolute privilege, but with his leaving the bench that view now has no adherents. On the other side of the spectrum, Mr. Justice White was not ready to require even negligence, much less reckless disregard, and the Chief Justice apparently took a similar

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The definition's use of words like "traitor" cannot be construed as representations of fact.

Id. at 284.

[73] This position was adopted by the *Restatement*, and is now spelled out in detail in RESTATEMENT (SECOND) OF TORTS § 566 (1977).

[74] 418 U.S. at 351-52.

position. The four dissenters thus went in opposite directions, and there is little chance of their getting together on a rule different from *Gertz*. The holding therefore seems to be stabilized enough to set the law for the future. For this reason I will recapitulate the holdings of the case. First, the Court unequivocally held: (1) that in an action against the communications media, a private plaintiff must at least prove negligence as to the truth or falsity of the defamatory statement, and (2) that a private plaintiff can recover only for actual harm suffered, at least if there was no knowledge or reckless disregard. Both of these rules will likely turn out to be broader. Second, the Court probably held: (1) that there can be no liability under the Constitution for the expression of an opinion alone that does not imply the existence of defamatory facts, and (2) that the concept of a public figure has been narrowed in scope.

The only important Supreme Court decision[75] since *Gertz* is *Time, Inc. v. Firestone*.[76] This case involved a report of a divorce decree in *Time* magazine's "Milestones" column. The report, it seems now to be pretty clearly agreed, must have been erroneous. The decree, according to *Time*, was awarded against Mrs. Firestone on the basis of extreme cruelty and adultery, although under the circumstances it could not have been for adultery. The judge's statements were so vague and uncertain that *Time* insisted it was right. The decision of the Supreme Court was rendered by Mr. Justice Rehnquist to the effect that the suit must go back for another trial to see if *Time* had been negligent in interpreting the decree. The Court held Mrs. Firestone was not a public figure, which brings in a negligence standard instead of a reckless-disregard standard. The reckless-disregard standard had been applied in the *Pape* case, where the plaintiff was a public official, and the Court had said that it is sufficient if the defendant's interpretation is at all a rational one. Under the negligence standard applied to private individuals, however, the interpretation must be found to be a reasonable one. The state courts must make that determination first, although it will still be open to review by the Supreme Court.

The *Firestone* opinion followed the lead of *Gertz* in narrowing the scope of meaning of the term "public figure." Now that the negligence standard has been substituted for strict liability in the case of private plaintiffs, a majority of the Court may well continue to narrow the meaning of public figure and may eventually limit it to persons who play an important part in formulating and controlling public opinion—

[75] One case decided the same day as *Gertz* is worthy of quick reference. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), held that a right-of-reply statute requiring a newspaper to give an opportunity to respond was unconstitutional.

[76] 424 U.S. 448 (1976).

people who are part of the "establishment," so to speak.

As in previous cases, there were numerous concurring and dissenting opinions. Mr. Justice Brennan, dissenting, again stated his point of view as set forth in *Metromedia*—succinctly and very aptly. Mr. Justice Marshall dissented from the holding that Mrs. Firestone was not a public figure. Mr. Justice White dissented from the holding that the state courts had not made a true finding that *Time* was negligent. Mr. Justice Powell concurred, explaining in more detail the position that this was not a holding that *Time* was negligent but that the state courts should make the first decision on a proper consideration of the evidence. On the whole, *Firestone* provided no substantial developments or changes.[77]

This brings us to date, then. A number of uncertainties and problems still remain. Are other improvements needed? There are some questions as to how much further the principles of *New York Times* and *Gertz* will apply.[78] There are also some questions as to what other torts those principles will affect.

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[77] Two other recent Supreme Court cases touching tangentially upon the issue of defamation and the first amendment should be mentioned. Paul v. Davis, 424 U.S. 693 (1976), held that damage to the plaintiff's reputation by an alleged defamatory police flier which indicated that he was an active shoplifter, did not involve any constitutional liberty or property interest sufficient to invoke the procedural protection of the due process clause. Since his allegations did not justify an action under 42 U.S.C. § 1983 (1970), plaintiff was thus left to whatever remedy he might have under state law. The second case, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), repudiated the doctrine that "commercial speech" is not entitled to the protection of the first amendment. The Court indicated, however, that a "different degree of protection" might be involved.

[78] There are a number of discussions of *Gertz* and its implications for the future. Some of the best of these include: Anderson, *A Response to Professor Robertson: The Issue Is Control of Press Power*, 54 TEX. L. REV. 271 (1976); Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975); Brosnahan, *From* Times v. Sullivan *to* Gertz v. Welch: *Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777 (1975); Christie, *Injury to Reputation and the Constitution: Confusion Among Conflicting Approaches*, 75 MICH. L. REV. 43 (1976); Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytic Primer*, 61 VA. L. REV. 1349 (1975); Frakt, *The Evolving Law of Defamation:* New York Times Co. v. Sullivan *to* Gertz v. Robert Welch, Inc. *and Beyond*, 6 RUT.-CAM. L.J. 471 (1975); Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976); Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221 (1976); Phillips, *Defamation, Invasion of Privacy and the Constitutional Standard of Care*, 16 SANTA CLARA L. REV. 77 (1975); Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199 (1976).

One of the best state court opinions on the subject is that of Judge Levine in Jacron Sales Co., Inc. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976). A summary of the changes made in the second *Restatement of Torts* as a result of the Supreme Court cases is found in Wade, *Defamation, The First Amendment and the Torts Restatement*, 11 FORUM 3 (1975). *See also* 3 RESTATEMENT (SECOND) OF TORTS, Special Note preceding § 558, at 151-53 (1977).

III. Future Developments

In the first two sections, I traced the history of the Supreme Court's control of the law of defamation through the cases construing the first amendment in this regard. The two landmark cases are *New York Times Co. v. Sullivan* and *Gertz v. Robert Welch, Inc.*, and together they have fairly well covered the area of defamation. *New York Times Co. v. Sullivan* applies to public persons—public officials or public figures—and holds essentially that it is necessary that the defendant's statement be not only defamatory but also intentionally false. I have changed the wording a little, and I plan to show later that the Supreme Court might have changed it as well, making it more helpful. *Gertz* applies to the case of the private person as plaintiff, and holds that the defendant's conduct must be at least negligent in regard to falsity of the statement. Additionally, *Gertz* provides that the plaintiff cannot recover except for actual harm. Finally, apparently the combination of the *Gertz* opinion and the holdings in two other decisions[79] indicates that there is no liability under the Constitution for the expression of a "mere comment," a statement that does not in express words or by implication assert a false statement of fact. If the statement merely characterizes something when the facts are known or have been disclosed to the parties, there is no liability.

This section will discuss some of the implications of these two landmark cases and will deduce from the opinions what the state of the law actually is today even though it may not have been fully expressed. In his opinion in *Gertz*, Mr. Justice Powell, writing for the majority, was extremely careful to limit his language to the precise facts that were before the Court. He spoke always of the liability of the communications media, the press or the publishers. One of the first questions that will arise is whether the principles of *Gertz* apply to defendants beyond the communications media. Though the opinion intentionally left the question open, one's first thought will be that the rules are not confined to the media and that this restricted wording was merely the Justice's caution in making sure that the opinion did not go too far. However, there are some independent indications this may be a sort of special privilege for the press. Mr. Justice Stewart has said so in a published speech. He emphasizes that the first amendment speaks of "freedom of speech and of the press," and urges that the drafters must have meant something by this or they would not have provided separately for the two.[80]

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[79] Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970). Both cases were discussed in section II., *supra*.

[80] Stewart, *"Or of the Press,"* 26 Hastings L.J. 631 (1975).

My personal viewpoint is that the application will not be confined in this fashion. Indeed, it seems to me that even Mr. Justice Stewart's view that the press is to be considered separately will not affect this issue because the press has already attained much of what it was seeking in the Supreme Court. The question now is not whether we are to give something additional to the press, but rather whether we will accord these same benefits to other people who may write or speak. If the press contended that the Court should not accord the same privileges to others, it would be taking a sort of dog-in-the-manger position, and I see no reason for it to do so or for the Court to accept such a position. Indeed, there are several cases decided by the Supreme Court in which the defendant could not be classified as a communications medium. This was true in *New York Times*. The action was not only against the *New York Times*, but was also against the private individuals who submitted the ad. It was also true in *St. Amant*[81] because the defendant was a candidate for office; in *Garrison*,[82] where the defendant was a district attorney; and in *Henry v. Collins*,[83] in which the defendant was entirely a private person.

All of those cases also involved a plaintiff who was a public person, and it would be possible to say that those cases apply only to the knowledge-or-reckless-disregard requirement and not to the negligence requirement. I do not think that will happen.

It is also true that each of those cases involved a public statement. Might it then be possible to say that application will not be limited simply to the press, but that these special requirements will be confined to public as distinguished from private statements? Those are the statements that lead to public debate and discussion of matters of public and general interest. Once again, my viewpoint is that it will not be so confined. Just stop to think about it a moment. Which one of these types of statements is most likely to create extensive harm? Obviously, the public statement is. Is it reasonable, then, to hold that less care is required to make the kind of statement that imposes the greater harm? The press particularly, and to some extent other people who make public statements, are professionals, people who are engaging in the activity as a business. Will it be regarded as fair to say that the people who are engaged in the activity as a business and know what they are doing are held to a lesser standard than the private individual who happens to

[81] St. Amant v. Thompson, 390 U.S. 727 (1968). See text accompanying notes 49 through 52 *supra*.

[82] Garrison v. Louisiana, 379 U.S. 64 (1964). See text accompanying notes 41 through 43 *supra*.

[83] 380 U.S. 356 (1965). See text accompanying note 44 *supra*.

make a casual remark? I think the answer will be no and that the *Gertz* requirements of negligence and actual harm will apply to private citizens as defendants, as well as to the press and to people who issue public statements.

Perhaps a distinction can be drawn in this connection between writings and oral statements—between what we call libel and slander. The arguments can be rehashed here, too, but I think the answer still is that it will not be done. The Court has laid down the rules in connection with the press, and refusing to distinguish the two would simply bring other individuals up to that standard by saying that they are entitled to what is essentially the same privilege in this regard.

In addition, the strict liability imposed by the common law prior to *Gertz* was constantly applied in actions against the press. Now that this application has been held unconstitutional, it hardly makes sense for the Court to permit the states to begin to apply it against private individuals. Even if permitted to do so, the states, which have never applied strict liability to private individuals in the past, will almost certainly decline to take such a step in the future.

Turning now from consideration of the nature of the defendants to the content of the communication, could the standard depend upon the nature of what is said rather than the manner in which it is said or who is saying it? For a considerable period of time there was a special set of holdings, called the commercial-speech doctrine, indicating that commercial speech is not subject to the protection of the first amendment.[84] The validity of that doctrine was not made clear until the decision last year in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[85] holding that commercial speech is also subject to the protection of the amendment, though there may be a different balance of interests attained in regard to it.

What about plain private gossip? It might be agreed that gossip surely is not a matter that involves how we govern ourselves and that there needs to be no protection for it. Maybe the Court will agree. My impression, though, is that the Court will not attempt to draw a line here, and that this too will be subject to the full protection of the first amendment. Gossip is natural. Everybody engages in it to some extent, and I think free speech will apply to it. It will be necessary to prove negligence or more.

Aside from the questions of fault as to truth or falsity and the nature of the communication, there are some other elements of a cause

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[84] *E.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); Valentine v. Chrestensen, 316 U.S. 52 (1942).

[85] 425 U.S. 748 (1976).

of action for defamation. What about the requirements regarding the defamatory character of the statements? Perhaps most of the time the fact that the statement is intentionally defamatory is self-evident, but not all of the time. Sometimes the things said are defamatory only if one happens to know some additional facts. The classic example is found in a Scottish case in which a rural correspondent sent an item to the newspaper announcing the birth of twins to Mr. and Mrs. George Morrison. It turned out that the Morrisons had not had twins and, indeed, had married only shortly before. The newspaper knew nothing about this. It had nothing to put it on notice that the item was defamatory, but it was held liable.[86] This is a different problem from truth or falsity, and there are some very real questions as to whether the *Gertz* principles apply. Suppose again that the existence of the defamatory nature is not clear. That, I think, was really the main problem in *New York Times v. Sullivan*. There were some errors, some fairly minor ones, but their defamatory character was not at all clear. The common law treatment of defamatory character held that it was the judge's function to determine whether the statement was capable of a defamatory meaning. If so, he let the case go to the jury, and the jury decided whether any recipient of the communication gave it that defamatory meaning.[87] The effect of the Constitution on this is a very substantial question that has not yet been addressed by the Court. My impression is that the requirement as to negligence will be applied constitutionally to the defamatory character of the statement. When the problem arises before the Court in such a fashion that it is clearly adverted to, I think that it is likely that the common law rules will necessarily be changed. Instead of considering whether the statement is capable of a defamatory interpretation, the constitutional approach may be to look at the question from the standpoint of the speaker and ask whether he as a reasonable person could foresee that the statement might be defamatory to someone. That is the way the question of negligence is usually presented.

There are also questions with regard to the reference to the plaintiff, the so-called colloquium. The Court mentioned the colloquium in *New York Times* and directed that it must be clearly indicated. I think the requirement of fault will apply to it as well. If, for example, the defendant uses a name that happens to be someone else's name, and there is no negligence in failing to realize this or to make the identification more specific, it seems likely that liability cannot constitutionally be applied.

Suppose there was a mistake as to what was said and the defendant had not intended to use the particular language. Suppose the offense is

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[86] Morrison v. Ritchie & Co., 4 Fr. Sess. Cas. 645 (Scot. 1904).

[87] RESTATEMENT (SECOND) OF TORTS § 614 (1977).

the result of a typographical error. Suppose it is a picture that turns out to be somewhat obscene, a characteristic unobserved until publication. Suppose it is a *lapsus linguae*—a slip of the tongue. Will liability be imposed for that? At common law it was; it was strict liability. There, too, I think that the requirement as to negligence or more will be imposed. Obviously, there remain a number of likely developments for the expansion of the principle of *Gertz*.[88]

To which, if any, of these several elements of a cause of action other than fault as to truth or falsity will the dichotomy of *New York Times* and *Gertz* apply? Strict liability may well be out so that the plaintiff may have to prove negligence at least. But what about the public plaintiff? Will he have to prove knowledge or reckless disregard, or will negligence be sufficient for some of these elements? Take, for example, the case of a typographical error or a statement known to be false and defamatory but published through mere negligence rather than intentionally or recklessly. What result?

How about the element of publication? There is no problem with newspapers because they intend to publish. Suppose, however, I write a private letter, intending to send it directly to the defamed person. Before it gets in the mail, the janitor comes along and reads it. Is there a requirement of fault in this regard? At common law there was. This was the one area in connection with defamation in which the law required fault in the form of negligence or intent. I think that will continue to hold[89] and will be a constitutional rule.

Another very important question is what effect the *Gertz* rules will have on the common law system of qualified privileges. This question gave us serious concern as we were trying to draft the second *Restatement of Torts*. It is a problem the Court did not perceive at the time. I have previously described the calculus of interests—that there was a prima facie case and then a number of qualified privileges that might be abused. The common law system allowed a qualified, or conditional, privilege if the defendant was seeking to protect his own interests, the interests of a third party or a common interest in these matters. He might abuse that privilege by speaking for the purpose of venting his ill will or for some other purpose than that for which the privilege was established. According to the majority rule, a defendant also abused the privilege if he made the statement without having reasonable grounds for believing it was true. Now, stop here and think a moment about what

[88] On all of these questions as to the prospective application of *Gertz*, see RESTATEMENT (SECOND) OF TORTS § 580B (1977), and the discussion in the accompanying comments.

[89] *See id.* § 577.

problem that creates. The case of *Gertz v. Robert Welch, Inc.* now holds that it is necessary to prove negligence regarding the truth or falsity of the statement in all of the cases in order to have a prima facie case; and the common law rule regarding a qualified privilege is that if the defendant is negligent regarding the truth or falsity, he has by that set of circumstances abused and thus eliminated the conditional privilege. What approach should be taken to resolve this incongruity? Does such a thing as a conditional privilege exist any more at all? In working out the second *Restatement* our problem was whether we should just erase all of the conditional privileges. Yet, that may not come about. The *Restatement* finally adopted a minority common law rule on abuse of conditional privileges under which negligence alone—or lack of reasonable grounds to believe the statement—does not constitute abuse of the privilege. Instead, it is necessary to prove reckless disregard as to the falsity. This is the provision now to be found in section 600 of the *Restatement*.[90] I think that, as time goes on, the Court will eventually hold that the requirement of negligence goes not just to truth or falsity, not just to defamatory content, not just to whether the defendant intended to say what he actually said, but to the general question of whether the defendant was negligent under the circumstances in publishing the statement. These circumstances include those that are presently considered in determining whether or not a privilege existed. This would absorb the conditional privileges. They and the ideas involved in them would be considered under the determination of whether the defendant's conduct was negligent. This may be a fairly rash prediction to make, but I think it indicates the eventual state of the law. Exactly when, I am not ready to predict.

Another question not settled by *Gertz* involves public persons. For the public person, the required fault regarding truth or falsity is knowledge or reckless disregard; for the private person, negligence or worse. Will it be possible for a public person to have some private affairs? Can it be held that a person is a public person for some purposes and a private person for other purposes? This will require a final ruling by the Supreme Court. The *Restatement* already allows for such a possibility.[91]

In addition, *Gertz* raised the whole issue of damages, and there are a lot of problems concerning this question. Mr. Justice Powell said in his opinion that recovery will be limited to damages actually proved, at least in the absence of proof of knowledge or reckless disregard.[92] What will be the meaning of this "at least" clause in that connection? Will it

[90] *Id.* § 600. *See also id.* § 580B, Comment e; *id.*, Special Note § 593.

[91] *Id.* §§ 580A, 580B.

[92] 418 U.S. at 349.

mean that if the plaintiff does prove knowledge or reckless disregard, then he can recover punitive damages and general or so-called presumed damages? If that were held to be so, it would seem that every time a public person sued and prevailed, he could recover presumed damages, and probably punitive damages. I think that this will not be true in regard to presumed damages, and that the Court will require proof of actual damages even in the case where there is proof of knowledge or reckless disregard. I am not sure what will develop with regard to punitive damages. My impression when I first read *Gertz* and thought about how the idea had come from the Marshall dissenting opinion in *Metromedia*, was that punitive damages were going to be eliminated entirely. However, there have been a number of lower court decisions holding that they can still be recovered.[93] If I had to guess now, I think the Court will probably eventually require both kinds of "malice" before punitive damages will be allowed. I said previously that I deprecated the use of the term "malice," and I must explain their use here. I think that the Court will require not only proof of knowledge or reckless disregard, or constitutional malice, but also proof of ill will, or the common law actual malice.

With regard to nominal damages, can a party bring a cause of action and say, "I'm not trying to collect actual damages. What I'm really doing is suing for the purpose of vindicating my reputation. I don't want money. I just want a declaration that this was a false statement about me. It is not true."? Vindication of reputation is important, and it ought to be more important than the money. It may be that the requirement of fault ought not to be imposed in a suit of this nature since even though the defendant was not negligent, the false statement may still be just as injurious to his reputation. It is possible that a balance can be attained by allowing the plaintiff who is not trying to impose the burden of heavy damages on the defendant to seek a declaratory judgment—and an action for nominal damages might essentially amount to that—for the sole purpose of vindicating his reputation.[94] The common law idea of converting any kind of injury into money has some serious drawbacks. On the other hand, the requirement of actual harm may be held to mean that an action for nominal damages cannot be brought at all.

What about the question of the weight of evidence? In *New York Times*, the indication was that a plaintiff had to prove the defendant's knowledge or reckless disregard of falsity by clear and convincing evi-

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[93] *See, e.g.*, Davis v. Schuchat, 510 F.2d 731 (D.C. Cir. 1975).

[94] *See* RESTATEMENT (SECOND) OF TORTS § 620. Comment *c* (1977); *id.*, Special Note following § 623.

dence. What is more, this was held to be a constitutional fact that was subject to appeal and would be given a full review by all the appellate courts including the Supreme Court. This requirement may apply to some of the other determinations, too. On that point, it is very difficult to speculate. The Court might find that clear and convincing evidence is a requirement in connection with negligence. I think the odds are against that holding, but it is likely that negligence will be a constitutional fact subject to full review.

Another very pressing problem is who has the burden of proving truth or falsity. Under the common law, the statement had to be false. The plaintiff was required to allege that it was false and defamatory, but at the same time the statement was presumed to be false. It was up to the defendant to raise the issue of truth as an affirmative defense, and the burden of proof as to truth was on him. You will find comments throughout the Supreme Court opinions about the defense of truth. They may not be realistic now. There are also some statements in the same opinions—casual statements with the Justices not thinking of this particular problem—that the plaintiff must prove falsity. Requiring the plaintiff to prove that the defendant was at fault regarding the falsity of his statement is essentially the equivalent of requiring him to prove that the statement was false. Can one succeed in proving negligence or worse regarding the falsity of a statement, without also proving that the statement was actually false? I think it is quite likely that the Supreme Court will decide that as a part of enforcing the requirement of fault it must place the burden of proof as to falsity on the plaintiff. That will also create some problems. Suppose the defamatory statement is: "Mr. Plaintiff is a liar, a downright liar," and nothing more. If the plaintiff must prove that he is not a liar, how does he present that kind of negative proof? Would it be sufficient for him to get on the stand and say, "I am not a liar"? Suppose the defendant responds, "You *are* a liar." What then? The common law puts the burden on the defendant in the beginning because it would be easier for him to point to a specific instance in which he claims the plaintiff told a lie and to introduce proof to that effect. Some procedural devices might be utilized to remedy the problem here, such as discovery or a motion to make more certain or to be more specific. If the charge is a broad, general one, the plaintiff should be able to require the defendant to point to a specific instance so that the plaintiff can introduce proof in regard to it.[95]

Another question is whether a defamation action can constitution-

[95] In the absence of a basis for making a decision it was found necessary to caveat the issue of the burden of proof in the second *Restatement*. See *id.* § 613, especially Comment j. *See also id.* § 581A (implying that there is no liability for a true statement, but carefully avoiding the question of who must prove truth or falsity).

ally be maintained for an expression of a "mere opinion." I referred to this earlier in my discussion of the *Gertz* case and gave my viewpoint as to the state of the law. However, there has been no clear, firm holding by the Court, and my opinion and the position in the *Restatement*[96] may not be accurate.

Still another question has already raised problems for the state courts and produced a considerable amount of disagreement. In *Gertz*, Mr. Justice Powell did not tell the states specifically that they had to impose a requirement of negligence in a suit by a private plaintiff. Instead he said the states may set their own "standard of liability" regarding truth or falsity, "so long as they do not impose liability without fault."[97] That means that a state must require negligence or greater fault. There has been a strong effort toward convincing the states that the principle of *Rosenbloom v. Metromedia*[98] ought to continue to apply here—if the case involves a matter of public or general interest, the requirement of knowledge or reckless disregard should be imposed. A few states have taken this position.[99] They will find the same difficulty the Supreme Court found in trying to define matters of public or general interest. The great majority of the courts to date have held that *Gertz* requires only negligence.[100] I think this will continue to be the majority rule. The requirement will be reckless disregard for a public plaintiff, since the Constitution requires it, but it will be negligence in regard to a private plaintiff.

IV. Torts Other Than Defamation

The title for these lectures is "The Communicative Torts and the First Amendment." Only brief discussion is needed on the application of the Supreme Court's defamation opinions to other torts. Except for the single tort of invasion of the right of privacy, the Court has had no occasion to consider the question of the effect of the first amendment on other torts involving communication, although the provision for "freedom of speech" would clearly include many torts.

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[96] See *id.* § 566.

[97] 418 U.S. at 347.

[98] 403 U.S. 29 (1971). See text accompanying notes 63 and 64 *supra*.

[99] Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450 (1975), *cert. denied*, 423 U.S. 1025 (1976); Patten v. Smith, 360 N.E.2d 233 (Ind. App. 1977); *cf.* Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975) ("grossly irresponsible").

[100] Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975); Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975); Wilson v. Capital City Press, 315 So. 2d 393 (La. App. 1975); Jacron Sales Co., Inc. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 97 S. Ct. 1160 (1977); Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 546 P.2d 81 (1976).

First, there are the cases involving the right of privacy. You will recall the discussion of the case of *Time, Inc. v. Hill*,[101] the so-called false-light case. The Court applied the knowledge-or-reckless-disregard standard, even though the plaintiffs were private persons, since what was involved was held to be a matter of public or general interest. I think it is very likely that *Time, Inc. v. Hill* will be restricted or overruled because it comes within the scope of *Metromedia*, which was disregarded in *Gertz*. It will probably be held that only negligence is required by the Constitution in a false-light suit by a private plaintiff.

The Supreme Court has not ruled on this, although it failed to seize an opportunity to do so in *Cantrell v. Forest City Publishing Co.*[102] This was also a false-light case, but the Court held that under the facts shown, it was appropriate to find reckless disregard. Consequently, it affirmed the holding for the plaintiff without determining whether a showing of negligence would have been sufficient.

The major question in connection with the right of privacy is whether a plaintiff can constitutionally recover for a public disclosure of true facts that are essentially private in nature and seriously embarrassing to him. The issue was presented to the Court in *Cox Broadcasting Company v. Cohn*,[103] but it carefully avoided ruling on the general problem. The defendant had broadcast the name of a rape victim in violation of a state statute. Abstaining from speaking on the broad question, the Court held that there cannot constitutionally be a cause of action for the disclosure of true facts if the matter involved is one "of legitimate public concern." This was the rule at common law, now raised to a constitutional level.[104] In this case the victim's name was in the indictment and a matter of public record. All public records, the Court said, are matters of legitimate public concern. The case leaves open the major question, and we have no way of predicting the Court's answer. Besides *Cox*, there have been a number of cases that might have raised the question and which the Court might have taken, but so far it has declined to do so. One fairly safe conclusion is that there will be a division on the issue. There is only one statement in *Cox* that provides a helpful clue. Justice Powell, in a concurring opinion in the *Cox* case, said that if "injuries quite different from wrongful damage to reputation flowing from false statements of fact" arise, the "Constitution may permit a different balance to be struck."[105] I think the justices will certainly consider the fact that what is involved in a privacy case is not

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[101] 385 U.S. 374 (1967). See text accompanying notes 53 and 54 *supra*.

[102] 419 U.S. 245 (1974).

[103] 420 U.S. 469 (1975).

[104] *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977).

[105] 420 U.S. at 500 (Powell, J., concurring).

damage to reputation but primarily emotional disturbance. Is that enough for a state to be allowed to impose liability? If the Court permits the action, it will find that it must define the expression "matter of legitimate public concern." That, of course, will be difficult, but at least the Court will be following the common law of torts in this regard and will have the benefit of state decisions that have developed a fairly clear definition. I think this is the most important question still pending in the general field of communicative torts on which it is not possible to predict with any degree of certainty what will happen.

Some other torts also deserve consideration. What the *Restatement* now calls "injurious falsehood"[106] used to be called disparagement; it is sometimes called trade libel or slander of title. This tort is very similar to defamation except that it does not hurt one's personal reputation—it hurts the individual's business. It may be an indication, for example, that a person's product or his title to property is not any good. The common law of torts has permitted recovery here, but it has always required proof of pecuniary loss. The damage requirement of *Gertz* is therefore already necessary but questions about the requirement of fault regarding truth or falsity still remain. Before 1976, it was thought that it might well be that this would be treated as a matter of commercial speech and, therefore, not subject to the restrictions of the first amendment. However, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[107] where the issue was squarely presented, the Court held that commercial speech is also entitled to first amendment protection. This was so even though there are "common sense differences" between it and other kinds of speech, and a "different degree of protection" may be appropriate.[108] My guess is that insofar as falsity is concerned, negligence will be required, but I am necessarily speculating.

The tort of misrepresentation also involves the use of speech. If I deceive someone and cause financial loss, will there still be liability for it? My answer is yes; I do not think there will be any strong interference with that liability. As a matter of fact, deceit involves the requirement of scienter, a knowledge of falsity, and negligent misrepresentation would come within the scope of *Gertz*. There are a few cases allowing relief for innocent misrepresentation, but those cases are practically always one in which the defendant was enriched as a result of his misrepresentation. Mulcting the defendant of his unjust enrichment is something that I think the Court is not going to be seriously concerned about.

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[106] *See generally* RESTATEMENT (SECOND) OF TORTS §§ 623A-652 (1977).

[107] 425 U.S. 748 (1976).

[108] *Id.* at 771-72, n.24.

Since there is no problem with proof of actual harm, I think misrepresentation is pretty safe as a tort.

What about assault? I come up behind you, put my finger in your back and say, "Look out. I'm going to shoot you." That is use of speech, and you are seriously upset by it. Will there be limitations on recovery for that? What about the Mississippi actionable words statute?[109] Calling a person a bad name is actionable within the states of Mississippi, Virginia and West Virginia. The Virginia statute was involved in a recent Supreme Court case,[110] but the Court treated the case as if it were solely a defamation action. What of playing a practical joke on someone and thereby intentionally inflicting mental suffering? In an early English case, a practical joker called a woman and said "Your husband has been in a terrible accident. He is here in the hospital. Come down as quickly as you can and bring a couple of pillows to put under his knees." She had serious emotional results.[111] That is speech, too. Can liability be imposed for it? I think Mr. Justice Powell's statements in *Cox Broadcasting Co.*[112] about a different balance from that in defamation cases will be applied in this area and that the Court will continue to allow liability to be imposed. Perhaps it is relevant, too, that *Firestone*[113] held that the plaintiff might recover in defamation for emotional suffering even though she did not seek recovery for damage to reputation.

How about ordinary negligence in the rendering of a service? A lawyer offers advice to a client. If that advice is negligent, will he be able to say, "Well, that was language. I cannot be held liable for the use of language"? Note that the liability is imposed for negligence, and that will bring the case within the scope of *Gertz*. I do not think there is any real indication that the common law in regard to the use of language of this sort will be subject to constitutional limitations, but it is always possible.

In the area of products liability, a warning or set of instructions issued with a product may be held to be inadequate or improper. That, too, involves communicative language. Will there be some constitutional limitations on the cause of action? My impression is that there

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[109] "All words which, from their usual construction and common acceptation, are considered as insults, and calculated to lead to a breach of the peace, shall be actionable . . . ." MISS. CODE ANN. § 95-1-1 (1972). *See* Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1950).

[110] Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974). See note 72 and accompanying text *supra*.

[111] The case was Wilkinson v. Downton, [1897] 2 Q.B. 57. Recovery was allowed.

[112] Cox Broadcasting Co. v. Cohn, 420 U.S. 469, 500 (1975) (Powell, J., concurring). See text accompanying notes 103 through 105 *supra*.

[113] Time, Inc. v. Firestone, 424 U.S. 448 (1976). See text accompanying notes 76 and 77 *supra*.

will not be any real modification of the present state of the tort law, but we must wait to see.

Intentional interference with contractual or other proposed relationships, existing or prospective, usually involves persuasion of an individual by use of language. Once again, this may turn out to be commercial speech most of the time and therefore accorded a lesser protection. In addition, since this is an intentional tort, the *Gertz* requirements may already be met. There is also malicious prosecution. The defendant tells the sheriff or the district attorney that the plaintiff has committed a crime, and he is prosecuted. This also involves the use of language. The *Gertz* requirement as to negligence may well apply. There may be other torts to which the first amendment will be held to apply, but these are the most important ones.

V. Conclusion

I return now to the tort of defamation. The common law of defamation has badly needed reform. It has been subjected to heavy criticism over the years, and those who have seriously studied it have concluded that it was packed with anomalies and greatly needed straightening out. Efforts were made, but they usually withered away from an overall reform to a few minor modifications. The task of reform was just too big.

At the same time the constitutional law of the freedom-of-speech clause of the first amendment needed development. The United States Supreme Court has struggled with this development for many years. In working on the task, the Court has perforce also assumed the task of reforming the law of defamation, and it has been doing a very thorough job.

Both of these tasks are concerned with the "proper accommodation" of conflicting interests. The balances have varied somewhat in the two sets of laws, and when there has been conflict, the constitutional law has prevailed. But the Justices are becoming better acquainted with tort law and its aims and purposes, and are now giving due consideration to them in striking the balances.

These developments are coming about through the traditional common law technique. Concrete cases are coming before the Court, and it is struggling with them, working out the problems on a case-by-case basis. There have been some wrong turns, but they have been corrected. There have been disagreements—almost violent at times. These disagreements still exist, but since the decision in *Gertz*, they do not seem as important. True, *Gertz* was a 5-to-4 decision, with one of the five wavering somewhat, but the four dissenters would be completely unable to get together to establish a majority. Two of them thought *Gertz* went too far, and two thought it did not go far enough. The decision is in the center and seems destined to stay there.

We now have a much better system, simplified and workable administratively—and with a better total balance of interests. Refinements are still needed, of course. And I have the temerity now, in closing, to offer a few suggestions for desirable developments that would still further improve the state of the law.

The Supreme Court should make the standards of conduct objective, rather than subjective. The reference should be to the conduct of the defendant rather than to his subjective state of mind. This approach will be more meaningful both to the actors (the publishers) and to the lower courts. At the same time the Court should work on a basis for determining the defamatory character of a communication. Make sure that the statement is truly harmful. Approach the question from the standpoint of the publisher: should he reasonably have realized that the statement was defamatory? Finally, the Court should make better use of the judicial control over damages to prevent a defamation action from becoming a club to beat the defendant over the head. Heavy damages should not be the main purpose of the suit.

The states, on their part, should abolish the distinction between libel and slander. The dichotomy was always subject to criticism, but now that a plaintiff is confined to recovery of damages for actual harm, there is no point in retaining a separate category of "special damages."

The Supreme Court and the states together should work out a system that will provide an appropriate remedy where fault is not proved or where a privilege exists. Vindication should be the principal remedy, not damages. Both the Court and the states should eschew the use of the word "malice." It is the bane of the law of defamation, and to have a special "constitutional malice" with a completely esoteric meaning is not helpful.

Whether or not these particular refinements are consummated, the developments I have described will continue. The Supreme Court has extensively reformed the law of defamation. The foundation and structure of the edifice have been established, the building has been changed from a ramshackle one to a sound and solid one, and all the signs point to a very fine completed project. We have the Supreme Court to thank.

EMPLOYEE RIGHTS AND ANTITRUST LIABILITY: ORGANIZED LABOR'S EXEMPTION AFTER *CONNELL*

*Armin J. Moeller, Jr.**

Congress enacted the Sherman Act[1] in 1890 to proscribe restraints of interstate or international commerce and to promote business competition.[2] In conflict with these purposes, however, Congress has also passed the Clayton Act,[3] section 6 of which grants an antitrust exemption to labor,[4] the Norris-LaGuardia Act[5] which prohibits federal courts from issuing injunctions in labor disputes,[6] and the National Labor Relations Act[7] allowing employees to form, join or assist labor organizations and engage in other concerted activities[8] and making employer interference with these rights an unfair labor practice.[9] By shielding labor organizations from the full impact of the antitrust laws, Congress furthered the labor aim of eliminating wage competition among employees doing the same job in the same industry[10] even though this aim tends to frustrate the national policies promoting free market competition. While Congress has recognized the problems inherent in this conflict and has offered limited solutions,[11] no fully satisfactory legislative answer has been found.[12] As a result, the Supreme Court has been faced

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[1] Ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (Supp. V 1975)). The Act provides for criminal sanctions against violations, 15 U.S.C. § 1 (Supp. V 1975), judicial enforcement, *id.* § 4 (1970), and applicability to all persons, corporations and associations, *id.* § 7.

[2] United States v. Von's Grocery Co., 384 U.S. 270, 274-77 (1966); D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co., 236 U.S. 165, 173-74 (1915).

[3] Ch. 323, 38 Stat. 730 (1914) (codified at 29 U.S.C. §§ 52 & 53 (1970) and 15 *id.* §§ 12-27 (1970), *as amended by* Antitrust Improvements Acts of 1976, Pub. L. No. 94-435, 90 Stat. 1383).

[4] 15 U.S.C. § 17 (1970).

[5] Ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-15 (1970)).

[6] 29 U.S.C. § 107 (1970).

[7] Ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-68 (Supp. V 1975)).

[8] 29 U.S.C. § 157 (1970).

[9] *Id.* § 158 (Supp. V 1975).

[10] Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 254 (1955).

[11] *E.g.*, 29 U.S.C. § 158(b)(4), (e) (1970) (declaring certain labor practices affecting commerce to be unfair labor practices).

[12] *See* Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975).

with the necessity of reconciling these conflicting policies and uncovering illusory congressional intent. The Court's most recent ameliorative efforts came in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*,[13] but the situation is still perplexing at best. This article will explore the conflict between these competing national policies in light of congressional and judicial reaction to the problem. Additionally, the Supreme Court's latest search for a labor-antitrust accommodation in *Connell* will be analyzed in an attempt to forecast the ramifications of the decision on subcontractor agreements in the construction industry.

I. Historical Background

A. *The Court's Initial View of Labor's Rights*

The Sherman Act was designed to eliminate the evils of business monopolies and trade restraints.[14] Whether Congress actually intended to subject labor unions to antitrust legislation has been the subject of conjecture,[15] but it is significant that an amendment to that end was defeated during the debates on the Act.[16] In any event, the United States Department of Justice did not harbor any reservations about applying the Act to labor. Indeed, of the first six antitrust cases initiated by the Department, four were against labor unions.[17] Despite such agressive enforcement, however, it was not until the 1908 case of *Loewe v. Lawlor*,[18] that the Supreme Court agreed that the Sherman Act's pros-

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> Congress rejected attempts to regulate secondary activities [by labor] by repealing the antitrust exemptions in the Clayton and Norris-LaGuardia Acts, and created special remedies under the labor laws instead. It made secondary activities unfair labor practices under § 8(b)(4) [of the National Labor Relations Act], and drafted special provisions for preliminary injunctions at the suit of the NLRB and for recovery of actual damages in the district courts.

Id. at 634.

[13] 421 U.S. 616 (1975).

[14] *See, e.g.*, Fashion Originator's Guild v. FTC, 312 U.S. 457, 464-66 (1941) (plan which in effect creates a monopoly "runs contrary to the policy of the Sherman Act"); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 609-10 (1914) (the Act "broadly condemns all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce").

[15] *See* Loewe v. Lawlor, 208 U.S. 274, 301-04 (1908) (surveying early applications of the Sherman Act to labor disputes); S. Cohen, Labor in the United States 447 n.16 (3rd ed. 1970); Cox, *supra* note 10, at 256.

[16] Boudin, *The Sherman Act and Labor Disputes: I*, 39 Colum. L. Rev. 1283, 1286-93 (1939); Cox, *supra* note 10, at 256. *See* Loewe v. Lawlor, 208 U.S. 274, 301 (1908) (noting rejection of the labor exemption amendment).

[17] A. Neale, The Antitrust Laws of the U.S.A. 16 n.1 (2d ed. 1970); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 Yale L.J. 14,15 (1963).

[18] 208 U.S. 274 (1908). This case is also referred to as the *Dansbury Hatters Case*.

criptions applied to labor unions.[19]

In 1914 Congress responded with section 6 of the Clayton Act which provided that "[t]he labor of the human being is not a commodity or article of commerce."[20] From this it followed that the existence of a union was not a violation of the antitrust laws, and members may "lawfully carry out the legitimate object[ive]s" of a union.[21] The Supreme Court's rejoinder in *Duplex Printing Press Co. v. Deering*,[22] however, largely nullified section 6 by interpreting the terms "lawfully" and "legitimately" as allowing only union activity with purposes that were legal under the Sherman Act.[23] Section 20 of the Clayton Act, which specified union activities considered lawful under federal law, was construed in the same decision to apply only to conduct involving an employer and its own employees.[24] Since section 16 of the Act provided for private injunctive relief which had previously been unavailable to employers,[25] the net effect of the *Duplex* decision was to erode organized labor's position as it had stood prior to passage of the Clayton Act.

Having established that the Sherman Act applied to labor activities, the Supreme Court proceeded to determine which union activities violated the Act and which did not. In *UMW v. Coronado Coal Co.*[26] the Supreme Court held that the union's subjective intent was a crucial element in determining the existence of a Sherman Act violation.[27]

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[19] The act made no distinction between classes. It provided that "every" contract, combination or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt by legislation, organizations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us.

Id. at 301.

[20] Ch. 323, § 6, 38 Stat. 730 (1914) (codified at 15 U.S.C. § 17 (1970)).

[21] *Id.* Before subsequent judicial decisions limited the effectiveness of the Act, see notes 22 through 33 and accompanying text *infra*, its language which sought to exempt labor from the reach of antitrust laws was hailed by Samuel Gompers as labor's "Magna Carta." *See generally* Gompers, *The Charter of Industrial Freedom—Labor Provisions of the Clayton Antitrust Law*, 21 AM. FEDERATIONIST 957 (1914).

[22] 254 U.S. 443 (1921).

[23] *Id.* at 465-69.

[24] *Id.* at 468-73.

[25] 15 U.S.C. § 26 (1970), *as amended by* Antitrust Improvement Acts of 1976, Pub. L. No. 94-435, § 302(3), 90 Stat. 1396.

[26] 259 U.S. 344 (1922).

[27] The Court reversed and remanded the case, holding that the obstruction of coal mining was

> not a restraint of that commerce unless the obstruction to mining [was] intended to restrain commerce in it or [had] necessarily such a direct, material and substantial effort to restrain it that the intent must be inferred.

Id. at 410-11. Following remand, the case again returned to the Supreme Court in Coronado Coal Co. v. UMW, 268 U.S. 295 (1925). The Court considered the only issue to be whether the acts committed were intended to restrain trade. *Id.* at 305.

Thus, the Court implied that any union activity was unlawful if it could be shown that the union's leadership intended to keep a nonunion product out of the interstate market.[28] Other decisions established that only unreasonable restraints on interstate commerce were violations of the Sherman Act[29] and that local work stoppages in support of union demands were permissible where the union sought to resolve a labor dispute with a specific employer.[30] Hence labor's basic weapon, the primary strike, ordinarily constituted an indirect restraint on competition and did not violate antitrust law.[31] Nevertheless, a local dispute could become a direct restraint on interstate commerce if the evidence showed that the union's purpose was to eliminate the competitive threat posed by the presence of the employer's nonunion goods in the product market.[32] Accordingly, boycotts and all related activities were ordinarily found to be illegal direct restraints on trade.[33]

B. Congressional Reaction and Judicial Reconsideration

The advent of the Great Depression saw a congressional response to *Duplex* and its progeny which abrogated their precedential value. Section 7 of the Norris-LaGuardia Act[34] was enacted to prohibit federal courts from issuing injunctions in labor disputes. The Act also broadened the definition of "labor dispute" to include disagreements between employers and employees who were not in proximate relation to each other.[35] Subsequently, the National Labor Relations Act granted all employees the right to form, join or assist labor organizations and to engage in concerted activities which had previously resulted in antitrust liability.[36]

The first significant case decided after these enactments was *Apex*

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[28] 259 U.S. at 410-11.

[29] United States v. American Tobacco Co., 221 U.S. 106, 181 (1911) ("reason" did not require that all contracts in restraint of trade come under the statute); Standard Oil Co. v. United States, 221 U.S. 1, 60, 66 (1911) ("rule of reason" used in applying Sherman Act).

[30] UMW v. Coronado Coal Co., 259 U.S. 346, 411 (1922).

[31] *Id.* at 403, 412.

[32] Coronado Coal Co. v. UMW, 268 U.S. 295, 310 (1925).

[33] *See* Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37, 47 (1927) (intent to interfere with interstate commerce found in boycott of goods shipped to another state); *cf.* Industrial Ass'n v. United States, 268 U.S. 64, 82 (1925) (no intent to interfere with interstate commerce found in permit system to guarantee "open shops"); United Leather Workers Local 66 v. Heckert & Meisel Truck Co., 265 U.S. 457, 464 (1924) (picketing of manufacturer found not to interfere with interstate commerce so long as the picketing did not interfere with shipping).

[34] Ch. 90, § 7, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 107 (1970)).

[35] 29 U.S.C. § 113(c) (1970). See note 24 and accompanying text *supra*.

[36] Ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. § 157 (1970)).

Hosiery Co. v. Leader.[37] Union members attempting to obtain a closed shop agreement[38] had occupied and wrecked the company's plant and physically prevented orders from being filled. The Court rejected the union's argument that it enjoyed an absolute exemption from the Sherman Act.[39] Instead, it found that the issue was whether the workers' conspiracy to halt the company's operations and thereby force submission to their demands in the labor dispute was the type of activity which the Act was designed to prevent.[40] The Court held that there was no antitrust violation since the union had not specifically intended to restrain competition in the employer's product.[41] More significantly, the opinion indicated that elimination of price competition based on difference in labor standards was not "the kind of curtailment of price competition prohibited by the Sherman Act."[42]

Although the language in *Apex Hosiery* suggested that a union's intent is material to the determination of an antitrust violation,[43] a new

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[37] 310 U.S. 469 (1940).

[38] A closed shop agreement is an agreement between an employer and a labor organization whereby the employer agrees to hire only members of that organization. Closed shops were made illegal by amendments to the National Labor Relations Act in 1947. Act of June 23, 1947, ch. 120, § 101, 61 Stat. 140 (1970) (current version at 29 U.S.C. § 158 (Supp. IV 1974)).

[39] 310 U.S. at 487-88.

[40] *Id.* at 501.

> This Court has never applied the Act to laborers or to others as a means of policing interstate transportation, and so the question to which we must address ourselves is whether a conspiracy of strikers in a labor dispute to stop the operation of the employer's factory in order to enforce their demands against the employer is the kind of restraint of trade or commerce at which the Act is aimed, even though a natural and probable consequence of their acts and the only effect on trade or commerce was to prevent substantial shipments interstate by the employer.

Id. at 487.

[41] *Id.* at 506.

[42] *Id.* at 504.

> Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, . . . an elimination of price competition based on differences in labor standards is the object of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.

310 U.S. at 503-04 (citation omitted).

The opinion distinguished between restraints on the product market and restraints on the labor market. *Id.* at 500-08. One problem with making this distinction is that labor activity affects prices which in turn affect the competitiveness of the business itself.

[43] *See* 310 U.S. at 485-86 (approving jury instructions which required intent "to cause the prohibited restraint on commerce").

theory of antitrust immunity was established one year later in *United States v. Hutcheson*.[44] *Hutcheson* began as a jurisdictional dispute between two unions over a work assignment by Anheuser-Busch. The losing union organized a strike among the employees of contractors who were erecting a building for Anheuser-Busch and a boycott of Anheuser-Busch beer by union members and friends. Under the rationale of the *Duplex* decision[45] the union's conduct would be considered a Sherman Act violation. Justice Frankfurter, however, examined the anti-injunction provisions of the Clayton and Norris-LaGuardia Acts and read them as a "harmonizing text" which provided a broad labor exemption from antitrust sanctions.[46]

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.[47]

While *Apex Hosiery* seemed to indicate that the Sherman Act did not apply to every restraint in the labor market,[48] *Hutcheson* created a complete exemption from antitrust laws for unions acting alone.[49]

The limits of lawful union activity under this standard were defined in *Allen Bradley Co. v. Local 3, IBEW*.[50] In an effort to obtain improved wages and working conditions for its members, Local 3 actively sought closed-shop agreements from electrical manufacturers and contractors in the New York City area. Under the union plan, the contractors agreed to purchase and install only the products of local union manufacturers, who agreed to sell locally only to agreeing contractors. The union's demands, enforced by conventional union tactics such as strikes and boycotts, produced a monopoly for the sale of electrical equipment in the New York City area. As a result, Local 3 members received higher pay and better working conditions, local electrical manufacturers increased their sales and union contractors were able to charge higher prices.[51]

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[44] 312 U.S. 219 (1941).

[45] See notes 22 through 25 and accompanying text *supra*.

[46] Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct.

312 U.S. at 231.

[47] *Id.* at 232 (citation omitted).

[48] See note 42 and accompanying text *supra*.

[49] 312 U.S. at 232.

[50] 325 U.S. 797 (1945).

[51] *Id.* at 798-801.

The Court condemned the arrangement as a business monopoly in violation of the Sherman Act from which Local 3 was not exempt, giving two reasons for its conclusion. First, Local 3 had not acted alone, but "in combination with business groups,"[52] and second, the industry-wide conspiracy had been intended to, and did, achieve direct trade and market controls.[53] *Apex Hosiery* was not applicable because the restraint was not confined to the labor market, and Local 3 was not saved by *Hutcheson* since it had not acted alone.[54] In holding that the *Hutcheson* standard controlled, the Court stated that "the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups."[55]

While *Allen Bradley* illustrates union activities beyond the pale of the labor antitrust exemption, *Hunt v. Crumboch*[56] shows the permissible limits of union enforcement after *Hutcheson.* In *Hunt* the petitioner trucking firm opposed unionization and attempted to operate during an ensuing strike. The labor union and The Great Atlantic and Pacific Tea Co., the trucking firm's sole customer, then agreed to a closed-shop arrangement by which A & P would ship merchandise only with firms which required all of their employees to belong to the union. When the union refused to negotiate with the petitioner and declined to allow any of the firm's employees to become members, A & P was obligated to terminate its freight contract with the petitioner, effectively destroying its business.[57] The Court, after finding there was no conspiracy involved,

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[52] *Id.* at 810.

> Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act.

Id. at 811. *See also* United States v. Brims, 272 U.S. 549 (1926) (forerunner of the "conspiracy with a non-labor group" cases).

[53] So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.

325 U.S. at 809 (citation omitted).

[54] St. Antoine, Connell: *Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 608 (1976). See notes 41, 42 & 49 and accompanying text *supra.*

[55] 325 U.S. at 810. For a critical analysis of the *Allen Bradley* decision, see Winter, *supra* note 17.

[56] 325 U.S. 821 (1945).

[57] *Id.* at 822-23. The refusal of the union to negotiate with the trucking firm stemmed from the implication of one of the firm's partners in the death of a union member. *Id.*

held that the union's activity was beyond the reach of the federal antitrust law and that "[t]he controversy in the instant case . . . involves nothing more than a dispute over employment, and the withholding of labor services."[58]

C. *Recent Developments:* Pennington *and* Jewel Tea

During its 1965 Term,[59] the Supreme Court decided the two most significant labor antitrust cases since *Allen Bradley*. In *UMW v. Pennington*,[60] and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,[61] the Court divided into three equal groups, producing five separate opinions for the two cases.[62] In *Pennington*, a group of small coal producers charged the United Mine Workers, certain large coal companies and a multi-employer collective bargaining unit[63] with conspiring to impose wage and royalty scales upon smaller, nonunion operators in order to eliminate them from the industry. The UMW contended that since the result of the plan would be to eliminate competition among workers based on differences in wages, it was exempt from liability under the antitrust laws.

In his majority opinion, Justice White acknowledged that a union may consummate multi-employer wage agreements and unilaterally seek the same terms from other employers without violating antitrust laws. The union forfeits its antitrust exemption, however, when it agrees to impose a set wage scale on other employers.[64] The Court concluded

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[58] *Id.* at 826. In addressing the immunity of labor, the Court stated, "That which Congress has recognized as lawful, this Court has no constitutional power to declare unlawful, by arguing that Congress has accorded too much power to labor organizations." *Id.* at 825 n.1.

[59] The twenty years that had elapsed since *Allen Bradley* produced no change in the formula the Court devised in that decision. *See* Los Angeles Meat & Provision Drivers Union v. United States, 371 U.S. 94, 99-100 (1962) (combination of union and independent businessmen sufficient to invoke the Act); United States v. Employing Plasterers Ass'n, 347 U.S. 186, 190 (1954) (combination of plasterers union and contractor not immune under the Clayton Act).

[60] 381 U.S. 657 (1965).

[61] 381 U.S. 676 (1965).

[62] Justice White authored the majority opinion in *Pennington* and announced the Court's judgment in *Jewel Tea*, joined each time by Chief Justice Warren and Justice Brennan. Justice Douglas, joined by Justices Black and Clark, concurred in *Pennington* but dissented in *Jewel Tea*. Justice Goldberg, in one opinion joined by Justices Harlan and Stewart, concurred in both judgments for separate reasons.

[63] A multi-employer bargaining unit is an association composed of employers who have designated the association as their bargaining agent to carry out the negotiation with the labor union. R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 86-87 (1976).

[64] 381 U.S. at 665. "[T]he policy of the antitrust laws is clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit." *Id.* at 668.

that, besides the anticompetitive effects of such a plan, the union's duty to bargain with each employer individually arose from the requirement that "economic units [which are parties to the collective bargaining process be free] to act according to their own choice and discretion."[65] The union would therefore be liable in a conspiracy to set standards outside the bargaining unit notwithstanding the fact that its "part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment."[66]

In *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*[67] a supermarket chain engaged in multi-employer negotiations in which all the employers, with the exception of Jewel Tea and one other, agreed to accept the union's proposal to limit meat market operating hours. Although it had asserted during negotiations that any restriction on marketing hours was illegal, Jewel Tea signed the contract under the threat of a strike vote and then brought suit against the union. Justice White immediately distinguished *Pennington* on the grounds that the *Jewel Tea* trial court had found no evidence to substantiate the company's claim of conspiracy between the union and the other employers.[68] He characterized the situation merely as one where the union, having obtained an agreement from one group of employers, had successfully sought the same terms from Jewel Tea.[69]

The opinion focused on the work hours provision of the agreement and found it to be within the realm of "wages, hours and other terms and conditions of employment" over which employers and unions must bargain under the National Labor Relations Act.[70] Justice White believed that the crucial factor in the Court's judgment was the relative impact of the agreement on the product market balanced against the interest of union members in obtaining the agreement.[71] After weighing these two conflicting interests, he felt that an agreement determining "when, as well as how long, employees must work" was beyond the reach of the Sherman Act.[72] Therefore, agreements "intimately related" to working conditions were exempt from antitrust regulation, regardless of

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[65] *Id.* at 665-68. Justice Douglas, in his concurring opinion, stated that an industry-wide collective bargaining agreement in which employers and a union agree on a wage scale that exceeded the financial ability of some operators was prime facie evidence of an antitrust violation. *Id.* at 674 (Douglas, J., concurring).

[66] *Id.* at 666.

[67] 381 U.S. 676 (1965).

[68] *Id.* at 688 (White, J., separate opinion).

[69] *Id.*

[70] *Id.* at 691; *id.* at 709-10 (Goldberg, J., concurring).

[71] *Id.* at 690 n.5 (White, J., separate opinion).

[72] *Id.* at 691.

an accompanying direct restraint on the product market.[73]

After *Pennington* and *Jewel Tea* there appeared to exist a two-pronged test which a labor union must pass to claim exemption from the antitrust laws. First, a conspiracy between labor and nonlabor groups which was detrimental to the business of another nonlabor group would preclude exemption. Second, where no conspiracy existed, and if the agreement encompassed a "legitimate union interest," the antitrust laws would not apply.[74]

II. The Court's Search for Labor-Antitrust Accommodations in *Connell*

In *Connell Construction Co. v. Plumbers & Steamfitters Local 100*,[75] the Court again attempted to accommodate the conflicting policies of labor and the antitrust laws. Connell Construction Company was a Dallas, Texas general building contractor which subcontracted all of its plumbing and mechanical work to both union and nonunion subcontractors on the basis of competitive bidding. The defendant union was the local bargaining representative for the plumbing and mechanical trades and, as such, was party to a multi-employer collective bargaining agreement with the area contractors association. Although Local 100 did not seek to represent Connell's employees, it did ask Connell to sign an agreement whereby Connell would subcontract its mechanical work only to firms maintaining a current contract with the union.[76] The contract contained a "most favored nation" clause by which the union agreed that if it granted a more favorable provision in a collective bargaining agreement to any employer, it would extend the same terms to all association members.

When Connell refused to sign the subcontracting agreement, Local 100 stationed a single picket at one of Connell's major construction sites. Approximately 150 workers, members of other craft unions, walked off the job and halted construction. Connell filed suit in Texas state court to enjoin the picketing as a violation of Texas antitrust laws, and Local 100 removed the case to federal court. Connell then signed the agree-

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[73] *Id.* at 689-91.

[74] *See id.* The "legitimate union interest" test formulated by Justice White in *Jewel Tea* requires a court to determine which of the two competing interests outweighs the other. A balancing test of this nature will ultimately depend upon "the economic prejudices of the judiciary with courts weighing the sound desirability or undesirability of the union's objectives." 61 Cornell L. Rev. 436, 444 n.5 (1976). See American Fed'n of Musicians v. Carroll, 391 U.S. 99 (1968) for an example of the unprincipled nature of a balancing test of this type.

[75] 421 U.S. 616.

[76] *Id.* at 620-21.

ment under protest. After amending its complaint to claim that the agreement violated sections 1 and 2 of the Sherman Act, Connell sought a declaratory judgment invalidating the agreement and an injunction against further efforts by Local 100 to force it to sign such an agreement.[77]

The district court[78] held that the subcontracting agreement was exempt from federal antitrust laws because it was authorized by a special proviso in section 8(e) of the National Labor Relations Act[79] applicable to the construction industry. The Fifth Circuit affirmed the trial court's decision, reasoning that since the union had not conspired with a nonlabor group and had acted in pursuit of a legitimate union objective, such conduct was exempt from the Sherman Act.[80]

In a 5-4 decision, the Supreme Court decided that Local 100's conduct was not exempt.[81] Justice Powell's majority opinion characterized the two basic sources of organized labor's exemption as statutory[82] and nonstatutory.[83] The Court noted that while "statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, . . . [t]hey do not exempt concerted

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[77] *Id.*

[78] 78 LRRM 3012 (N.D. Tex. 1971), *aff'd*, 483 F.2d 1154 (5th Cir. 1973), *rev'd*, 421 U.S. 616 (1975).

[79] 29 U.S.C. § 158(e) (1970) provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: . . . *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

[80] 483 F.2d 1154, 1170 (5th Cir. 1973), *rev'd*, 421 U.S. 616 (1975).

[81] 421 U.S. 616 (1975).

[82] Labor organizations have been granted statutory exemptions from the Sherman Act based on the Clayton and Norris-LaGuardia Acts in at least five cases: American Fed'n of Musicians v. Carroll, 391 U.S. 99 (1968); Hunt v. Crumboch, 325 U.S. 821 (1945); United States v. Hutcheson, 312 U.S. 219 (1941); Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc., 311 U.S. 91 (1940); New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

[83] Labor organizations have been granted nonstatutory exemptions based on the National Labor Relations Act in two cases, Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965), and Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959).

action or agreements between unions and nonlabor parties."[84]

The nonstatutory exemption, on the other hand, is the necessary accommodation between the congressional policy favoring collective bargaining under the National Labor Relations Act and the alternative policy favoring free competition in business markets. The Court acknowledged that appropriate recognition of the nonstatutory exemption required restraint of business competition based on differences in wages and working conditions.[85] A union may not, however, impose direct restraints on competition among those who employ its members. Thus, a union's unilateral conduct to restrain competition is lawful if it is covered by the statutory exemption. But since union activities which seek to restrain competition directly through union-employer agreements are only entitled to a nonstatutory exemption, they are not protected merely because the union acts alone in promoting them.[86]

Justice Powell measured the restraints imposed upon the business market by Local 100 against the objectives sought by the union and found that Local 100 had used direct restraints upon the business market in support of its organizing campaign.[87] The subcontracting agreement sought by the union indiscriminately excluded nonunion subcontractors from a portion of the market, even if their competitive advantages were derived from more efficient operating methods rather than from substandard wages and working conditions.[88] Local 100, by using such an agreement, was thus restraining a "positive value" which the antitrust laws were designed to protect.[89]

The Court next examined the "most favored nation" clause of the multi-employer agreement which gave every signatory to the contract a guarantee that no contractor dealing with the union would receive preferential treatment. Through this clause subcontractors in the association were direct beneficiaries of Local 100's organizing efforts, and association members were sheltered from outside competition in that portion of the market.[90] The agreement's net effect, then, was to restrict

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[84] 421 U.S. at 621-22 (citations omitted).

[85] *Id.* at 622.

[86] Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market.

Id. at 622-23.

[87] *Id.* at 623.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 623-24.

competition by means unrelated to the elimination of substandard wages, hours, and working conditions.[91] Indeed, the anticompetitive nature of the agreement was so pernicious that Local 100 could even control entry into the market and "thus might be able to create a geographical enclave for local contractors, similar to the closed market in *Allen Bradley* . . . ."[92]

The Court acknowledged that the union's goal of organizing as many contractors as possible was legal even though each union success reduced the competition faced by union employers from nonunion firms.[93] It decided, however, that the mere legality of the union's goal did not immunize its methods from antitrust sanctions. Since the conduct of Local 100 imposed a direct restraint on competition, the union was not entitled to a statutory exemption.[94] Nevertheless, the Court stated, "a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement."[95] Local 100 had claimed an interest in representing only plumbing and mechanical employees, however, and had ignored Connell's employees, making the federal policy of favoring collective bargaining inapplicable to the union's attempts to exclude nonunion mechanical firms from the market.[96]

Local 100, on the other hand, contended that the agreement obtained from Connell was permitted by section 8(e) of the National Labor Relations Act.[97] The Court considered this logic enticing, since the first

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[91] *Id.* at 625.

[92] *Id.* Potential union powers under the agreement included elimination of nonunion competitors, sheltering union contractors and controlling union contractor competition in the mechanical field by excluding marginal union firms or "traveling" subcontractors. *Id.* at 623-25. See notes 50 through 55 and accompanying text *supra*.

[93] *Id.* at 625.

[94] *Id.*

[95] *Id.* at 625-26.

[96] *Id.* at 626.

[97] 29 U.S.C. § 158(e) (1970). In National Woodwork Mfg. Ass'n v. NLRB, 386 U.S. 612 (1967), the Court held that unions did not violate the "hot-cargo" or "secondary-boycott" provisions of the NLRA by maintaining and enforcing contract provisions that (1) gave union members the right to refuse to install prefabricated doors at a construction site and (2) specified that an employer would not subcontract certain construction work. The Court found the purpose of the clause was to preserve work traditionally performed by union members. *Id.* at 645-46.

Such "work preservation" clauses have led owners to specify in the construction contract with the general contractor the prefabricated materials and related technology to be used. The theory behind the practice is that if the contractor does not have the "right to control" the materials to be used on the jobsite, the unions' work preservation clause would be unenforceable against the contractor. The NLRB, applying the right-of-control test, held that a union violated the secondary boycott provisions of the NLRA where a neutral contractor did not enjoy the right to control under the contract. Local

proviso to section 8(e) permits "an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction . . . or other work."[98] Still, the Court determined that the provision was narrowly drawn and that its sole purpose was to prevent union members from having to work alongside nonunion laborers on the same construction site.[99]

Local 100, however, did not claim that its subcontracting agreement was related to these policies. Indeed, it applied only to that work which Local 100 members could perform and allowed free subcontracting of other requirements, an arrangement which might result in Local 100 members working alongside nonunion subcontractors. Nor was the union interested in organizing nonunion subcontractors on the building site it picketed. In the end, its only objective was to pressure mechanical subcontractors in the Dallas area to recognize it as their employees' representative.[100] The Court rejected this argument as it feared that allowing unions to bargain with "stranger" contractors who do not employ union members would give the unions an almost unlimited organizational weapon.[101] Furthermore, the enactment of section 8(b)(4)(B) in 1959[102] revealed a congressional purpose to limit "top-down" organizing

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636, United Ass'n of Journeymen v. NLRB, 177 N.L.R.B. 189 (1969), *rev'd and remanded*, 430 F.2d 906 (D.C. Cir. 1970). The NLRB's position was ultimately sustained in NLRB v. Pipefitters Local 638, 429 U.S. 507 (1977).

[98] 29 U.S.C. § 158(e) (1970).

[99] 421 U.S. at 630.

> [T]he Court has interpreted the construction-industry proviso as "a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interest there, but to ban secondary-objective agreements concerning nonjobsite work, in which respect the construction industry is no different from any other." . . . Other courts have suggested that it serves an even narrower function: "[T]he purpose of the section 8(e) proviso was to alleviate the frictions that may arise when union men work continuously alongside nonunion men on the same construction site."

Id. (citations omitted).

[100] 421 U.S. at 631.

[101] The better view appears to be that Congress, and not the courts, should deal with secondary arrangements for organizational purposes and decide which weapons should or should not be available to the parties.

> Rendering judgments of this nature, about the appropriate economic weapons to be allowed the parties in an organizational campaign or other industrial combat, has long been thought to be the province of the Congress, not the courts.

St. Antoine, *supra* note 54, at 624 (footnote omitted).

[102] Act of September 14, 1959, Pub. L. No. 86-257, § 704(b), 73 Stat. 543 (codified at 29 U.S.C. § 158(b)(4)(B) (1970)).

campaigns[103] such as Local 100 was attempting in the Dallas area.[104] The Court concluded the legislative history indicated that Congress did not intend to specially exempt the construction industry from its proscription against "top-down" organizing efforts.[105]

Local 100 asserted that even if it had violated section 8(e) or other provisions of the National Labor Relations Act, the violations precluded antitrust liability because the remedies provided by the same Act controlled. The Court acknowledged that the legislative history of the 1947 Taft-Hartley Amendments prohibiting secondary activities under section 8(b)(4) offered some support for the union. But that history had no relevance to the question of whether Congress meant to preempt antitrust suits based on "hot cargo" agreements which had been outlawed by Congress in 1959.[106]

The Court summed up:

> We therefore hold that this agreement, which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only to firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions.[107]

III. Labor's Antitrust Exemption Revisited

Connell provides neither employees' nor employers' counsel with

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[103] In a "top-down" organizing campaign, a union pickets and boycotts to compel the employer to unionize. Such tactics effectively deprive the employees of the right to decide whether to join a union. *See* 421 U.S. at 632.

[104] *Id.*

[105] *Id.* at 632-33.

[106] *Id.* at 633-34. A "hot-cargo" agreement is an agreement by an employer not to use the services or handle the goods of nonunion employers. Prior to being outlawed, 29 U.S.C. § 158(b)(4)(B) (1970), "hot-cargo" agreements were very effective in forcing signatories to curtail business relations with nonunion firms and keeping nonunion goods out of commerce.

[107] 421 U.S. at 635. Additionally, the Court agreed that federal antitrust law preempted the field from state jurisdiction. *Id.* While it refused to hold that agreements between union and nonlabor parties were not subject to state antitrust laws, it decided that whenever Congress' detailed system for regulating employee organizational techniques are necessarily involved, state antitrust law could not be permitted to regulate union activity closely related to organizing efforts. *Id.* at 637.

The dissent contended that legislative history demonstrated a clear congressional intent that labor law remedies, and not antitrust remedies, would be the exclusive relief for injuries caused by union secondary activities and agreements. 421 U.S. at 639. Arguing that Congress intended for labor law remedies to be exclusive, the dissent noted that Congress rejected an attempt to extend antitrust coverage to labor in the same year it gave parties injured by illegal labor activity a right to sue for actual damages, 29 U.S.C. § 187 (1970). 421 U.S. at 644-46. Since 1947 Congress has twice rejected proposals to extend the scope of antitrust remedies to include illegal labor activity. *Id.* at 650-54.

the long awaited guideposts needed to lead their clients out of the labor-antitrust labyrinth. Nevertheless, the case does establish certain antitrust principles and reinforces others which limit the scope of labor's exemption. The application of the statutory exemption to labor contracts has been virtually eliminated by the Court's finding that labor agreements similar to that in *Connell* are not the types of union activity Congress sought to protect through the Clayton and Norris-LaGuardia Acts. Such agreements automatically involve labor-nonlabor combinations even when the union acts unilaterally in seeking to impose an agreement acceptable to other employers. The promotion of any labor agreement apparently makes it impossible for a labor organization to meet *Hutcheson*'s two-fold standard for the statutory exemption, *i.e.* acting in its self-interest and not in combination with a nonlabor party,[108] since a union is never acting alone in seeking to extend a contract to other employers.

Labor can justly criticize the Court's position as being harsh and inconsistent. For example, the Norris-LaGuardia Act permits a union to engage in specified collective activities even though they result in injury to an employer and have direct anticompetitive effects.[109] Under *Connell*, however, when employees seek an agreement confirming the objects of those lawful activities, they lose their antitrust exemption.[110] Additionally, Congress specifically provided for federal court enforcement of contracts between employers and labor organizations[111] to encourage peaceful resolution of labor disputes, enforce collective bargaining contracts and sanction arbitration agreements as the preferred

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[108] See notes 44 through 49 and accompanying text *supra*.

[109] *See* 29 U.S.C. § 104 (1970) (enumerating labor activities immune to injunctive action).

[110] The majority in *Connell* refused to determine whether injunctive relief to prohibit picketing was available to employers under the Sherman Act. Connell had obtained a temporary restraining order from a lower court but subsequently executed the subcontracting agreement under protest.

> Accordingly, there is no occasion for us to consider whether the Norris-LaGuardia Act forbids such an injunction where the specific agreement sought by the union is illegal, or to determine whether, within the meaning of the Norris-LaGuardia Act, there was a 'labor dispute' between these parties. If the Norris-LaGuardia Act were applicable to this picketing, injunctive relief would not be available under the antitrust laws . . . .

Id. at 637, n.19 (citation omitted). The Tenth Circuit recently confronted this question, but refused to extend the *Connell* rationale to embrace injunctive relief. It held instead that federal district courts lacked authority under the Norris-LaGuardia Act to enjoin peaceful picketing of a general contractor where the union's object was to obtain a "prevailing wage" subcontracting agreement. Utilities Serv. Eng'r, Inc. v. Colorado Bldg. & Constr. Trade Council, 549 F.2d 173, 177-78 (10th Cir. 1977).

[111] 29 U.S.C. § 185 (1970).

method for settling disputes.[112] By denying jurisdiction to the National Labor Relations Board in enforcement disputes, Congress plainly indicated that industrial peace would be best served by granting full power to federal courts to interpret labor agreements. Yet *Connell* represents an erosion of the authority conferred upon federal courts to promote industrial peace by giving a narrow reading to employer-employee agreements.[113]

The *Hutcheson* statutory exemption is further weakened by *Connell*'s focus on the actual anticompetitive effects of the subcontracting agreement and the identifiable direct restraints on the market. The Court apparently abandoned the *Hutcheson* test of self-interest altogether, indicting that if direct restraints on the market are likely to flow from the proposed agreement, the union's self-interest cannot shield it from antitrust liability.[114] Since liability under the Sherman Act extends to conduct which has an indirect effect on interstate commerce or market price competition, this concept may signal an expansion of antitrust liability far beyond the language of *Connell*.[115]

The applicability of the nonstatutory exemption to union conduct does not depend upon whether the collective action is unilateral or in

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[112] Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers Int'l., 370 U.S. 254, 263 (1962); Charles Dowd Box Co., Inc. v. Courtney, 368 U.S. 502, 509 (1962); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451-57 (1957).

[113] The Court's recent trend toward narrowly interpreting the terms of collective bargaining agreements is exemplified by its decision in Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 405-08 (1976), where a sympathy strike was found to be outside the terms of the employer-union agreement although the agreement contained broad no-strike and arbitration clauses.

[114] Under traditional antitrust concepts, even a conspiracy by a labor organization with itself can violate the Sherman Act. In Thomson Newspapers, Inc. v. Toledo Typographical Union Local 63, 387 F. Supp. 351 (E.D. Mich. 1974), the plaintiff brought an antitrust action against certain newspaper unions, a union-owned newspaper and a competing newspaper. The plaintiff alleged, *inter alia*, that the unions which had struck the plaintiff over a wage dispute had conspired to drive him out of business by several anticompetitive devices. *Id.* at 352. The unions claimed a blanket antitrust exemption, but the Court held that a Sherman Act violation could be proved by evidence showing that the unions conspired with either the competing newspaper or their own nonprofit newspaper to injure the plaintiff's competitive position. *Id.* at 352-53.

[115] The reach of the Sherman Act is the full extent of Congress' broad commerce power. Thus, a holding that certain activity is outside the reach of the Sherman Act constitutes a determination that the conduct is beyond Congress' power to regulate. Yet the proposition that courts have placed few limits on the commerce power needs little documentation . . . . Congress may regulate purely intrastate activity as long as the conduct has a substantial effect on interstate commerce.

Hudson Valley Asbestos Corp. v. Lougher Heating & Plumbing Co., 510 F.2d 1140, 1142 n.1 (2d Cir.) (citation omitted), *cert. denied*, 421 U.S. 1011 (1975).

combination with another party. Indeed, *Connell* indicates that this factor is irrelevant.[116] Rather, the nonstatutory exemption, designed to accommodate the conflict between the national labor policy and antitrust laws, implicitly requires that a union's objectives be balanced against the anticompetitive effects of its actions. *Connell* creates the additional requirement that union methods in seeking otherwise legitimate objectives must be lawful.[117] Thus, labor organizations which engage in activities resulting in anticompetitive effects must be able to demonstrate that they are pursuing legitimate union objectives recognized by the national labor policy and that the means by which they seek to attain their objectives are lawful. While the parameters of legitimate union objectives and the lawful means of pursuing them are not clearly defined, *Connell* indicates that where a labor organization engages in unfair labor practices to promote even legitimate objectives, it loses its nonstatutory exemption.[118]

Considered in an historical perspective, labor organizations can also justifiably express alarm at the development of a "balancing" test to determine labor's antitrust exemption. Apparently, labor's objectives and the means employed to achieve them are to be scrutinized in relation to the broad goals of the national labor policy and Congress' preferred methods of achieving those goals. If the union's objectives and means are prima facie lawful, then the courts will consider the actual anticompetitive effects and direct restraints imposed on the market by union conduct. Where these anticompetitive effects are too great, the nonstatutory exemption gives way to the Sherman Act.

Labor's fear of a return to labor antitrust liability based on the subjective whims of judges as previously expressed in *Loewe* and subsequent decisions[119] are not unfounded. When confronted with issues such as the legality of union objectives and methods, as balanced against the parameters of the national labor policy and the anticompetitive nature of direct restraints on the market, judges must rely on subjective impressions based upon their own social, economic and political philosophies.[120] The necessity of discretion inherent in *Connell*'s balancing

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[116] See note 86 and accompanying text *supra*.

[117] 421 U.S. at 625.

[118] *Id.* The addition of this "lawful means" requirement arguably doubles a labor organization's burden for successfully claiming a nonstatutory exemption, since the lower courts are now called upon to evaluate subjectively both the legitimacy of a union's objective and the legality of the methods employed to achieve it. This bifurcated test has significantly expanded the opportunities for a judge's political and economic philosophy to influence the future course of labor's exemption.

[119] See notes 18 through 33 and accompanying text *supra*.

[120] Addressing this problem in his concurrence in *Jewel Tea*, Justice Goldberg stated that

test[121] is likely to lead to conflicting decisions reflecting these divergent judicial views.

Unionized employers will also find little solace in *Connell*. Employers with collective bargaining agreements have a direct, immediate interest in seeing that their competitors do not enjoy a competitive advantage from either nonunion status or a more favorable agreement. While the Court expressed disfavor with "most favored nation" clauses in *Connell* and *Pennington*,[122] such clauses are the unionized employer's only assurance that the contracting labor organization will not grant more favorable terms to another employer at his expense. As a practical matter, once an employer enters a collective bargaining agreement, its interest in eliminating competition based on differences in wages and benefits within the industry is probably greater than the union's. The employer's ability to survive economically may well be at stake, whereas the impact on union members is limited to wage and benefit differentials. Whether or not unionized employers actively conspire with a labor organization to eliminate nonunion competitors and unionized competitors with less costly labor contracts, their interest in doing so is always present.[123]

> Congress intended to foreclose judges and juries from roaming at large in the area of collective bargaining, under the cover of the antitrust laws, by inquiring into the purpose and motive of the employer and union bargaining on mandatory subjects. Such roaming at large, experience shows, leads to a substitution of judicial for congressional judgment as to how collective bargaining should operate.

381 U.S. at 716 (Goldberg, J., concurring). In his dissent in *Duplex*, Justice Brandeis also argued that judges should not fashion national labor policy but should leave the job for the Congress. 254 U.S. at 488 (Brandeis, J., dissenting).

[121] 421 U.S. at 622-23.

[122] Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 623-25 (1975); UMW v. Pennington, 381 U.S. 657, 665 (1964).

[123] The economic disadvantages of being a union employer with nonunion competitors is most evident in the construction industry. For example, the average hourly pay, including fringe benefits, of unionized workers in the building industry as of January 3, 1977, was: construction laborers, $9.25; painters, $10.86; plasterers, $11.30; bricklayers, $11.90; carpenters, $11.98; electricians, $12.57; plumbers, $13.20. The average hourly wage of all building trades workers is $11.55. U.S. NEWS & WORLD REPORT, February 28, 1976, at 79. In Jackson, Mississippi and the surrounding area, the applicable hourly rates including fringe benefits for unionized workers covered by the Master and Crafts Agreements between area contractors and unions effective January 1, 1977, are: construction laborers, $5.30; bricklayers, $8.51; carpenters, $8.48; iron workers, $10.70; and operating engineers, $8.85. Master and Crafts Agreement Between the Associated General Contractors of Mississippi, Inc. and the Jackson Building and Construction Trades Council 2-3 (Aug. 22, 1975) [hereinafter cited as Master Agreement].

The economic incentive for the development of nonunion construction firms can be seen by the increase of union hourly rates in central Mississippi during the past five years. On January 1, 1972, union construction workers covered by the Master Agreement of the

IV. *Connell*'s Impact on Subcontract Agreements

While *Connell* affects many areas of the labor-management relationship, its immediate impact falls on subcontractor agreements in the construction industry. These agreements are prevalent among unionized contractors throughout the country. The terms may vary from *Connell*-type agreements, which restrict subcontracting to those subcontractors who have current agreements with construction trades unions, to agreements requiring all subcontractors to offer wages, fringe benefits and overtime rates of pay equivalent to unionized contractors.[124] The more narrowly drawn subcontracting agreements avoid a number of the objectionable features found in *Connell*. For example, a subcontracting agreement restricted to equalizing wages and fringe benefits would not restrain access to the subcontracting market or give labor organizations the power to automatically exclude subcontractors. Consequently, this type of agreement appears to confine itself to preserving the union's legitimate interests in eliminating differences in wage rates paid employees doing the same job in the same industry.

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above organizations received: laborers, $3.47; carpenters, $5.85; iron workers, $6.35; and operating engineers, $6.05.

It should be noted that while construction activity in central Mississippi has expanded substantially since 1972, the number of employers represented by the Associated General Contractors of Mississippi, Inc. in their current Master Agreement with the Jackson Building and Construction Trades Council has dropped from 21 in 1970-72, to 17 in their current agreement. This drop contrasts with the rapid growth of a predominantly nonunion Mississippi employers' association known as Mississippi Associated Builders and Contractors, Inc. When it affiliated with the National Associated Builders and Contractors, Inc. in September, 1973, it had 48 members. It now boasts over 165. The number of nonunion members in the Associated General Contractors of Mississippi, Inc. has also increased substantially.

[124] Section 9.1 of the 1975-77 Master Agreement, *supra* note 123, provides:

> The members of the Association will include in each subcontract the following clause:
>
> "All subcontractors will be required to pay their respective employees the wages, including fringe payments, and overtime rates of pay for hours worked over eight (8) per day or forty (40) hours per week, and observe the apprentice to journeyman ratios as set forth in the attachments to the agreement between the Associated General Contractors of Mississippi, Inc., and the Jackson Building and Construction Trades Council, AFL-CIO, attached to this agreement as Exhibits No. 1-A through F and 4. The Association agrees that subcontractors employed by its signatory members will comply with the terms of provisions of Article 8 of this agreement, the Adjustment of Grievance.
>
> The geographical area, for the purpose of this subcontract clause only, shall be Hinds County, and that area of the adjacent counties lying within a twenty-five (25) mile radius of the City Hall in Jackson, Mississippi."

Master Agreement, *supra* note 123, at 10-11. The subcontracting clause was deleted from the 1977-78 Master Agreement.

The realities of labor-management relations, however, defy such a simplistic explanation. Even limited subcontracting agreements ordinarily require that the subcontractor observe the apprentice to journeyman ratios contained in related contracts.[125] Apprentice programs are universally joint union-unionized employer programs, and the collective bargaining agreement establishes the specific ratio of apprentices to journeymen which can be employed,[126] depending upon the size of the project. The nonunion employer would not ordinarily employ any apprentices within the meaning of a union apprentice program. Consequently, if he is to have the advantage of employing apprentices at less than journeyman rates on a union job, he must hire union apprentices and not his own nonunion employees. Since none of his own employees are recognized apprentices, he can be forced to pay all of his employees journeyman rates regardless of their level of experience. Consequently, innocuous subcontract language concerning apprentice to journeymen ratios can act as a direct restraint on the employment of nonunion personnel by means which do not seek merely the elimination of wage competition among employees.[127]

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[125] See note 124 *supra*.

[126] The ability to employ apprentices on a union project confers a substantial economic benefit. For example, the following wage schedule currently applies to carpenters' apprentices in the Jackson, Mississippi area:

1st six months Apprentice—60 % of Journeyman Rate
2nd six months Apprentice—65 % of Journeyman Rate
3rd six months Apprentice—70 % of Journeyman Rate
4th six months Apprentice—75 % of Journeyman Rate
5th six months Apprentice—80 % of Journeyman Rate
6th six months Apprentice—85 % of Journeyman Rate
7th six months Apprentice—90 % of Journeyman Rate
8th six months Apprentice—95 % of Journeyman Rate

Master Agreement, *supra* note 123, at 35-36.

[127] In Operating Eng'rs Local 370 v. Neilsen & Co., 92 LRRM 2861 (D. Idaho 1975), a case after *Connell*, the defendant had agreed to the following subcontract clause:

> The terms and conditions of this Agreement affecting the Contractor shall apply equally to any subcontractor employed by the Contractor on work covered by this Agreement, likewise to any subcontract which the Contractor shall enter into. A subcontractor is one who takes over any part of a complete section of a general contract, including the furnishing of material for and the performance of labor on the job.

Id. at 2862.

The plaintiff union argued that the clause was distinguishable from the one in *Connell* since it did not require the defendant to deal solely with union subcontractors. *Id.* at 2863. The court disagreed, finding that numerous other contract provisions had the effect of compelling the defendant to use only union subcontractors. *Id.* at 2863.

The court also found that the subcontract clause could not be shielded from the Sherman Act by the construction industry proviso to Section 8(e) because (1) it promoted a boycott of nonunion firms not limited to a particular job or plaintiffs' crafts, and (2) it

Furthermore, observing the union apprentice to journeyman ratios and working conditions can also imply acceptance of the work rules and trade jurisdictions[128] maintained by the various craft unions. The rates which a nonunion subcontractor working under a subcontracting clause can be required to pay to his employees will then be determined by the craft unions' trade jurisdiction rules. The nonunion contractor free of any such agreement, on the other hand, often achieves a substantial competitive advantage over the union contractor by freely assigning workers to various tasks without regard to craft restrictions.

Since building and construction trades unions affiliated with the AFL-CIO have historically maintained rigid craft jurisdiction boundaries, a member of one trade is not permitted to perform any work within the jurisdiction of another labor organization.[129] For instance, on union construction sites cement finishers are limited to cement finishing work,

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had unlawfully precluded the union from dealing with subcontractors individually. *Id.* at 2864.

[128] While the work jurisdiction forming the basis of an AFL-CIO union's existence in the construction industry may be generally understood, the boundaries separating each union's work jurisdiction have never been clear. To resolve interunion jurisdictional disputes involving the same work, the Building and Construction Trades Department, AFL-CIO, has established the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry. Procedural Rules and Regulations of the Impartial Jurisdictional Disputes Board and Appeals Board Procedures 24-29 (June 1, 1973). Through the Appeals Board and Hearings Panel procedure, the work is awarded to one of the claimant unions. However, since the plan covers only those contractors and unions bound by labor agreements, *id.* at 24-25, jurisdictional disputes continue to occur on union projects, sometimes requiring use of the NLRB's remedial processes under §§ 8(b)(4)(D), 10(k) and 10(1) of the National Labor Relations Act, 29 U.S.C. §§ 158(b)(4)(D), 160(k)-*(1)* (1970).

[129] The Building and Construction Trades Department, AFL-CIO, includes the following affiliated organizations: International Association of Heat and Frost Insulators and Asbestos Workers; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers; Bricklayers, Masons and Plasterers' International Union of America; United Brotherhood of Carpenters and Joiners of America; International Brotherhood of Electrical Workers; International Union of Elevator Constructors; The Granite Cutters' International Association of America; International Association of Bridge, Structural and Ornamental Iron Workers; Laborers' International Union of North America; The Wood, Wire and Metal Lathers International Union; International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters' Helpers and Marble Mosaic and Terrazzo Workers' Helpers; International Union of Operating Engineers; International Brotherhood of Painters and Allied Trades; Operative Plasterers' and Cement Masons' International Association of the United States and Canada; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada; United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association; and Sheet Metal Workers' International Association. U.S. DEP'T OF LABOR, DIRECTOR OF NATIONAL UNIONS AND EMPLOYEE ASS'NS 1973, 10 (Supp. 1 1975). Nonaffiliated labor organizations, such as the Teamsters Union, also frequently perform work at construction sites.

laborers can only be assigned to essentially unskilled functions, carpenters must work with wood, but not necessarily related products, and electricians may only perform electrical work regardless of its relationship to tasks being performed around them. The application of union trade jurisdiction rules forces the subcontractor to give up the freedom to assign employees as necessary to available work and, therefore, produces clear anticompetitive effects not related to the elimination of wage differences among employees.[130] The construction industry constantly changes with the introduction of new materials and techniques, creating vast gray areas as to where one trade union's jurisdiction ends and another's begins. Unclear jurisdictional boundaries frequently result in one union's raiding another's craft, a process which can ultimately lead to jurisdictional disputes and work stoppages.[131] The jurisdictional autonomy of unions also leads to the related problem of restrictive work rules and practices which prevent the use of the most efficient operating methods unrelated to wages.

A nonunion contractor who becomes involved in a dispute over the application of a subcontracting clause may be bound by the grievance machinery contained in the labor agreement between the general contractor and the union.[132] Ordinarily, contract grievances are heard by a panel consisting of an equal number of representatives of the unionized employers and the unions. Since the unionized contractors are burdened by the provisions imposed by their collective bargaining agreement, their interest in seeing that subcontractors fully comply with the terms of the agreement is no less than that of the unions. Thus, the issues could be decided by a panel in which the nonunion subcontractor is without representation.

Even though the grievance procedure may provide for binding arbitration by an impartial third party, the vast majority of disputes are usually decided by the joint employer-union grievance committee. The grievance committee decision is binding as law upon covered employers

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[130] While it is difficult to determine with certainty the precise impact of union work rules, jurisdictional lines and wage rates on construction costs in contrast to nonunion operations, the author has spoken to contractors who have estimated and bid projects on both a union and nonunion basis. There appears to be some measure of agreement that restrictive union work rules, jurisdictional lines and wage rates add approximately 20% to a typical project's cost in central Mississippi, with the greater proportion of that differential being attributed to union jurisdictional lines and restrictive work practices. Nonunion contractors, however, claim that total employee compensation in nonunion operations is often equal to that received by union employees because of frequent unemployment which affects union employees.

[131] See note 128 *supra*.

[132] See note 124 *supra*.

and enforceable in federal district court.[133] The standard for review of a grievance committee decision is narrow, and the courts will not ordinarily evaluate the merits of the decision.[134]

By its nature, the subcontracting agreement is another form of a "most favored nation" clause by which the union has agreed to forego its obligation under the National Labor Relations Act to bargain on a unit-by-unit basis. While a subcontracting clause which requires only equivalent wage payments rather than union status may appear to avoid the problem of making the subcontracting agreement a "top-down" organizing weapon, an unclear line exists between a union's demand for equivalent wages and working conditions and a demand that a subcontractor adopt a collective bargaining agreement. Although elimination of wage competition is a legitimate union goal, requiring the adoption of a contract violates section 8(b)(1)(A) and 8(b)(7) of the National Labor Relations Act.[135]

V. *Connell* AND SHERMAN ACT ENFORCEMENT

One weakness inherent in evaluating *Connell* from a labor relations perspective is that it is also an antitrust case. While many writers have discussed its impact on labor rights,[136] little has been written about the public's rights under the Sherman Act to enjoy the positive benefits resulting from free market competition.

The *Connell* majority must be commended for its forthright analysis of the consequences of Local 100's activities. The Supreme Court could have avoided these issues by holding that on the basis of the record before it there was no evidence of any actual anticompetitive

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[133] *Cf.* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) (decision of arbitrator not reviewable on merits).

[134] Safeway Stores v. American Bakery & Confectionary Workers Local 111, 390 F.2d 79, 82 (5th Cir. 1968) (court cannot strike arbitrator's award unless palpably faulty).

[135] Section 8(b)(1)(A) makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of the rights guaranteed by § 7. 29 U.S.C. § 158(b)(1)(A) (1970).

Section 8(b)(7) prohibits unions from picketing or threatening to picket any employer where an object is to force the employer to recognize or bargain with the union as the employees' representative or force the employees to accept the union as their representative unless it is currently certified as the representative of such employees. 29 U.S.C. § 158(b)(7) (1970).

The distinction between payment of union wage rates and adoption of union contract terms has been made by the NLRB in many 8(b)(7) cases. *E.g.*, Retail Clerks Local 899, 166 NLRB 818 (1967).

[136] *See generally The Supreme Court, 1974 Term*, 89 HARV. L. REV. 49, 234 (1975); 61 CORNELL L. REV. 436 (1976); 44 FORDHAM L. REV. 191 (1975); 12 HOUS. L. REV. 1176 (1975); 21 LOY. L. REV. 980 (1975); 50 TUL. L. REV. 418 (1976); 28 VAND. L. REV. 1337 (1975); 21 VILL. L. REV. 342 (1976).

effects. Likewise, section 8(e) could have been held to legitimize the union's activities regardless of their anticompetitive effects. These options were rejected, however, and the Court chose instead to grapple with the economic realities presented by the facts before it.

Before the Sherman Act was passed in 1890, the Supreme Court took a narrow view of interstate commerce.[137] Since then, however, the Court has allowed the Sherman Act to grow along with expanding notions of congressional authority to regulate commerce and expansion of interstate commerce through developments unforeseen when the Sherman Act was passed. Essentially, the Supreme Court has attempted to guide the Sherman Act wherever commerce has gone.[138] To do otherwise would, of course, immunize entire new fields from antitrust liability.

The Supreme Court has recognized the increasing area of conflict between local, state and federal laws, regulatory agencies which influence economic behavior, and the Sherman Act's objectives.[139] Yet, the Court has attempted to maintain inviolate the legal principles which further the Sherman Act's original objectives. It has consistently looked upon antitrust immunity with disfavor,[140] even where regulatory statutes obstensibly approve certain conduct.[141]

Connell and other recent cases are illustrative of these principles. In *Cantor v. Detroit Edison Co.*,[142] the Supreme Court was faced with a Sherman Act claim against an electric utility which distributed free light bulbs to residential subscribers in exchange for burned out bulbs. The utility contended its action was exempt because the Michigan Public Service Commission had adopted the program by regulation, and under state law, the utility was not free to abandon it.[143] The Court

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[137] Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 Nw. U. L. Rev. 71, 84 (1974).

[138] *But cf.* United States v. American Bldg. Maintenance Indus., 422 U.S. 270 (1974) (refusing to interpret "in commerce" under the Clayton Act as broadly as "affecting commerce" under the Sherman Act).

[139] *See, e.g.*, Pan American World Airways, Inc. v. United States, 371 U.S. 296, 309-10 (1962) (conflict between courts and Civil Aeronautics Board).

[140] *See* Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 682 (1975) (repeal of antitrust laws by implication not favored).

[141] "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963), *citing* Keogh v. Chicago & Nw. Ry., 260 U.S. 156, 163 (1922); *see* Otter Tail Power Co. v. United States, 410 U.S. 366, 372-73 (1973) (refusal to grant antitrust exemption under section 202(b) of the Federal Power Act); Pan American World Airways, Inc. v. United States, 371 U.S. 296, 309-10 (1963) (conflict of court's construction of antitrust laws and CAB's antitrust authority under Federal Aviation Act).

[142] 428 U.S. 579 (1976).

[143] *Id.* at 585.

refused to grant an exemption, holding that state law could not exempt private conduct which was unlawful under federal antitrust laws.[144]

Similarly, in *Goldfarb v. Virginia State Bar*,[145] the Bar contended that the Sherman Act was not meant to embrace the regulation of a profession and that, in any event, its minimum fee schedules were sanctioned by state law. The Court, however, rejected the argument for a total exclusion from antitrust regulation,[146] stating that Congress intended to "strike as broadly as it could in § 1 of the Sherman Act."[147] Furthermore, prior cases had established repeatedly that there is "a heavy presumption against implicit exemptions."[148] The conduct was deemed to be in violation of the Sherman Act, and accordingly, no exemption was granted.[149]

In *Hospital Building Co. v. Trustees of Rex Hospital*,[150] a proprietary hospital owner alleged that a private, tax-exempt hospital had conspired with others to block the relocation and expansion of the plaintiff's hospital to enable the defendants to monopolize local hospital services.[151] The defendants contended that the Sherman Act was not meant to embrace local activity which did not have a substantial effect on interstate commerce.[152] The district court and the Court of Appeals for the Fourth Circuit agreed with the defendants,[153] but the Supreme Court reversed. The Court held that wholly local business restraints can produce effects condemned by the Sherman Act[154] and that even an admittedly indirect effect on interstate commerce was within the reach of the Act.[155] The Court also found the defendants' intent to affect interstate commerce irrelevant. It was the probable consequences of their acts, not what they may have believed them to be, which brought their conduct within the coverage of the Sherman Act.[156]

VI. Conclusion

Many years ago the Supreme Court recognized that labor organiza-

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[144] *Id.* at 594-95.
[145] 421 U.S. 773 (1975).
[146] *Id.* at 779.
[147] *Id.* at 787.
[148] *Id.*
[149] *Id.* at 791-92.
[150] 425 U.S. 738 (1976).
[151] *Id.* at 740.
[152] *Id.* at 742.
[153] 511 F.2d 678, 682 (4th Cir. 1975).
[154] 425 U.S. at 743, *citing* United States v. Employing Plasterers Ass'n, 347 U.S. 186, 189 (1954).
[155] 425 U.S. at 744.
[156] *Id.* at 745.

tions are no longer the embryonic groups requiring the substantial legislative protection granted them by earlier statutes: "After all, the labor movement has grown up and must assume ordinary responsibilities."[157] Labor organizations control tremendous anticompetitive forces which can be employed to achieve objectives both legal and illegal under the Sherman Act. While labor organizations might benefit from an inflexible rule fixing the boundaries of labor's antitrust exemption, the Supreme Court has gone to extraordinary lengths in antitrust cases to preserve its options. The nature and scope of interstate commerce is commensurate with new congressional enactments, spending policies and technological developments which are constantly changing the contours of American business. The Court's opinion in *Connell* will not make the labor relations attorney's task of advising his clients in the labor-antitrust area easier, but it will preserve the Court's flexibility to guard the public's interest in maintaining some semblance of free market competition. To this end, the Court has struck a desirable and constructive balance between the rights of labor and the public.[158]

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[157] Linn v. Plant Guard Workers Local 114, 383 U.S. 53, 63 (1966).

[158] "We have long since concluded that the value of unions in our society makes them worth promoting. Having made that judgment, we must be prepared to abide some of the consequences." St. Antoine, *supra* note 54, at 631.

FEDERAL APPELLATE REVIEW OF REMAND ORDERS: EXPANSION OR ERADICATION?

*J. Michael Myers**

The reviewability of removal orders entered by federal district courts has been the subject of concentrated erosion and occasional challenge in recent decisions emanating from the United States Supreme Court and the various circuits. The oft-condemned standard that remand orders are not subject to any form of appellate review has been successfully challenged by litigants who express displeasure with the procedure under which the federal district court is the tribunal of last resort. As a result, certain remand orders may now be subjected to a limited review.

Although recent developments provide encouragement that full appellate review of remand orders may be forthcoming, various restrictions and incongruities have permeated these authorities, thereby placing the current status of the remand rules in disorder. The purpose of this article is to analyze this currently unfolding facet of remand procedure and to advocate the adoption of certain standards which the author feels would facilitate the administration of justice.

I. History and Purpose of Non-Reviewability

The underlying purpose for the enactment of the removal statutes was to avoid any local prejudice that might inure to the detriment of nonresident litigants[1] and to assure an appropriate forum for those causes predicated upon the laws of the United States which have been brought in state court.[2] The federal courts have struggled with the re-

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[1] Brown v. Hartford Ins. Co., 168 F. Supp. 769, 797 (N.D. Ill. 1958); Bradley v. Halliburton Oil Well Cementing Co., 100 F. Supp. 913, 918 (E.D. Okla. 1951); Hall v. Great Northern Ry., 197 F. 488, 490 (D. Mont. 1912). *See generally* Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Prob. 3, 22-28 (1948); Friendly, *The Historical Basis of the Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 495-98 (1928); Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. Pa. L. Rev. 869, 873-76 (1931).

[2] The purpose of allowing removal of federal question cases parallels the reason for federal question jurisdiction itself. *See* Boys Mkt., Inc. v. Retail Clerks Union, 398 U.S. 235, 236 n.13 (1970).

> [F]ederal question removal jurisdiction may well have been intended to provide a forum for the protection of federal rights where such protection was deemed necessary or to encourage the development of expertise by the federal

moval statutes since their inception. The United States Court of Appeals for the Fifth Circuit for example has referred to removal as a "complex" procedure,[3] and it has also been said that "there is no other phase of American jurisprudence with so many refinements and subtleties [as] removal proceedings."[4]

Remand orders have likewise proved troublesome for the courts, and through the years this particular aspect of removal has received wide and varied construction. Prior to 1875, the remand of a removed case was not subject to review on appeal or writ of error since the remand order was not deemed final,[5] although review by mandamus was permitted.[6] In an 1875 removal statute,[7] Congress provided for review of remand orders by appeal and writ of error, but these provisions were repealed shortly afterwards.[8] Finally, in 1948, the removal statutes were again amended,[9] and 28 U.S.C. § 1447(d) was given its present form: "An order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise." Ostensibly, this language is designed to avoid "delays [caused] by the repeated and prolonged federal litigation of jurisdictional questions"[10] and to preclude the interruption of the case on the merits.[11] At least one court has suggested that this statutory language is necessary, reasoning that upon remand the district court immediately loses jurisdiction of the case, and hence no jurisdiction exists to support appellate review.[12] Since this rationale appears to be of little substance,[13] the singular justification for section 1447(d) remains the aversion for both delay and interruption of proceedings.

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courts in the interpretation of federal law . . . .

Id. at 236-37.

[3] Capital Bancshares, Inc. v. North Am. Guar. Ins. Co., 433 F.2d 279, 280 (5th Cir. 1970).

[4] Hagerla v. Mississippi River Power Co., 202 F. 771, 773 (S. D. Iowa 1912); *accord*, Flory, *Federal Removal Jurisdiction*, 1 LA. L. REV. 449, 449 (1939).

[5] Chicago & A.R.R. v. Wiswall, 90 U.S. (23 Wall.) 507, 508 (1874).

[6] *Id.*

[7] Judiciary Act of 1875, ch. 137, § 5, 18 Stat. 470.

[8] Judiciary Act of March 3, 1887, ch. 373, § 2, 24 Stat. 552.

[9] Judiciary and Judicial Procedure Act of 1948, ch. 646, § 1, 62 Stat. 869 (codified at 28 U.S.C.).

[10] Peerless Weighing & Vending Mach. Corp. v. Public Bldg. Comm'n, 209 F. Supp. 877, 882 (N.D. Ill.) (three judge court), *appeal dismissed*, 371 U.S. 801 (1962); *see Ex parte* Bopst, 95 F.2d 828, 829 (4th Cir. 1938) (similar wording in a pre-1949 version of the statute).

[11] Chandler v. O'Bryan, 445 F.2d 1045, 1057 (10th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972).

[12] Leslie v. Floyd Gas Co., 11 F. Supp. 401, 402 (E.D. Ky. 1935).

[13] Bucy v. Nevada Constr. Co., 125 F.2d 213, 217 (9th Cir. 1942).

Until recently there was little doubt that there could be no appellate review of district court orders remanding cases to the state courts from which they had been removed.[14] Section 1447(d) has long been construed to prohibit review of remand orders by direct appeal or by mandamus.[15] Indeed, remand orders have been held to be absolutely nonreviewable,[16] and courts have rejected efforts by appellants to seek review by direct appeal,[17] collateral attack,[18] writ of certiorari,[19] and prohibition or mandamus.[20] Even the district court entering the order of remand has been prevented from rehearing and vacating the order.[21]

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[14] *See, e.g.*, United States v. Rice, 327 U.S. 742, 751-52 (1946) (Congress denied "any form of review of an order or remand, and before final judgment, of an order denying remand"); United States *ex rel.* Walker v. Gunn, 511 F.2d 1024, 1027 (9th Cir. 1975) (district court properly disclaimed jurisdiction where jury empanelling had begun in state court), *cert. denied*, 423 U.S. 849 (1976); McClanahan v. Louisiana, 399 F.2d 695, 695 (5th Cir. 1968) (per curiam) (refusing to review lower court's decision that case did not come within § 1443 exceptions); *cf.* Southeast Mortgage Co. v. Mullins, 514 F.2d 747, 749 (5th Cir. 1975) (order of dismissal resulting in remand may be reviewed).

[15] *E.g.*, Employers Reinsurance Corp. v. Bryant, 299 U.S. 374, 378-79 (1937) (Congress effectively foreclosed review by mandamus when it removed review by appeal); *In re* Matthew Addy S.S. & Commerce Corp., 256 U.S. 417 (1921) (same); *In re* Pennsylvania Co., 137 U.S. 451, 453-57 (1890) (same). Denial of a motion to remand, on the other hand, may be reviewed on appeal from a final judgment. American Fire & Cas. Co. v. Finn, 341 U.S. 6, 14-18 (1951); 27 OKLA. L. REV. 99, 100 (1974).

[16] *See* Chandler v. O'Bryan, 445 F.2d 1045, 1057 (1971) ("determination of a federal district court that a case is not removable and remanding it to a state court is final"), *cert. denied*, 405 U.S. 964 (1972).

[17] *See* Metropolitan Cas. Co. v. Stevens, 312 U.S. 563, 565 (1940) (no review of remand directly or indirectly by appeal of the state court decision); McClanahan v. Louisiana, 399 F.2d 695, 695 (5th Cir. 1968) (no review except in certain civil rights cases); Thomas v. Texas & N.O.R.R., 118 F.2d 75, 75 (5th Cir. 1941) (remand not appealable; permitted as to separate claims); *In re* Satterly, 102 F.2d 144, 144 (5th Cir. 1939) (per curiam) (remand decision not reviewable by "any form or procedure"); Humphreys v. Love, 61 F.2d 908, 908 (5th Cir. 1932) (per curiam) ("appeal [of remand] does not lie"); Merchant v. Mead-Morrison Mfg. Co., 29 F.2d 40, 41 (2d Cir. 1928) (remand order "admittedly not subject to review"); Dunkin Donuts of America v. Family Enterprises, Inc., 381 F. Supp. 371, 373 (D. Md. 1974) (reminding parties that remand is not appealable after endorsing the district court's order as proper).

[18] Aaacon Auto Transp., Inc. v. Eichler, 392 F. Supp. 926, 928 (E.D.N.Y. 1975) (one district court's remand order prevented another's assumption of jurisdiction).

[19] Pickwick-Greyhound Lines v. Shattuck, 61 F.2d 485, 487 (10th Cir. 1932) (certiorari not available where remand order was proper).

[20] Stein's Stores, Inc. v. Taylor, 216 F.2d 439, 439 (6th Cir. 1954) (per curiam) (mandamus not available to challenge district court's judgment on question of jurisdiction); Mutual Ins. Co. v. Holly, 135 F.2d 675, 676 (7th Cir. 1943) (no jurisdiction to issue mandamus where none exists to review remand order). *But see* Santa Margarita Mut. Water Co. v. State Water Rights Bd., 165 F. Supp. 870, 879 (S.D. Cal. 1958) (district court admitted no appeal lies but nonetheless delayed remand to allow party to seek mandamus).

[21] *In re* La Providencia Dev. Corp., 406 F.2d 251, 252 (1st Cir. 1969) ("state court

Most of these decisions were either predicated upon a strict construction of the removal statutes,[22] or they advanced the theory of lack of further jurisdiction in the federal tribunals.[23] Yet, while one court has unequivocally held that remand orders are not reviewable by "any form of procedure,"[24] others have indicated that, were they not restricted from doing so, they would be inclined to review the order where an appellant's arguments appear meritorious.[25]

The incongruity of such a rule is evident in comparison with the routine review given denials of remand orders.[26] In fact, the Fifth Circuit has not only allowed interlocutory appeals of denials[27] but has also reviewed them as incidental to a final appealable judgment.[28] Although no case has yet allowed review of an order directing remand as incidental to a final order, one could argue that revocation of the removal bond[29] in favor of the plaintiff is an appealable final order carrying with it the question of the propriety of the remand.

In spite of the avowed concern for avoiding delay of the case on the merits, a considerable advancement toward obtaining appellate review of remand orders accompanied the passage of the Civil Rights Act of 1964[30] which established federal appellate jurisdiction over remand orders in certain cases.[31] The moving force behind this expansion of appellate authority was the concern "that strict impartiality [might not be] possible in [a] State court."[32] Since the issue of the appealability of

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proceedings are to be interfered with once, at most").

[22] *See id.* (removal statutes should be strictly construed because they operate to the prejudice of state proceedings).

[23] Birdseye v. Shaeffer, 140 U.S. 117, 118 (1890) (finding neither jurisdiction nor a final judgment from which an appeal could be taken); Leslie v. Floyd Gas Co., 11 F. Supp. 401, 402 (E.D. Ky. 1935) (remand order "ipso facto terminated the jurisdiction of [the district] court").

[24] *In re* Satterly, 102 F.2d 144, 144 (5th Cir. 1939) (per curiam).

[25] *See, e.g.*, American Homes Assurance Co. v. Insular Underwriters Corp., 454 F.2d 317, 319 (1st Cir. 1974) (court was "cognizant" of delay and "sensitive" to harshness of rules, but was still constrained from hearing appeal of remand).

[26] *See* American Fire & Cas. Co. v. Finn, 341 U.S. 6, 14-18 (1951) (vacating judgment where removal was improper and remand had been denied).

[27] *See* Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen Local 340, 427 F.2d 325, 326 (5th Cir. 1970) (interlocutory appeal of denial on issue of proper parties to removal).

[28] Capital Bancshares, Inc. v. North Am. Guar. Ins. Co., 433 F.2d 279, 282 (5th Cir. 1970) (appeal of remand denial can be had, but only if "incidental to some 'final' appealable judgment").

[29] 28 U.S.C. § 1446(d) (1970) requires the posting of a bond to effectuate removal.

[30] Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C. and at 28 U.S.C. § 1447(d) (1970)).

[31] 28 U.S.C. § 1447(d) (1970).

[32] Georgia v. Rachel, 384 U.S. 780, 787 n.7 (1966).

remand orders has been foreclosed in the area of civil rights litigation,[33] the courts have not found it necessary to become embroiled in jurisdictional controversies on countless appeals,[34] and consequently, the administration of justice has proceeded on a more even basis.

The door to appellate review of remand orders began to open as the circuits encountered cases in which the remand order was clearly erroneous or was potentially the result of an abuse of the district court's discretion. An early example is *Bankers Securities Corp. v. Insurance Equities Corp.*,[35] a case which was removed to a New Jersey district court with the necessary amount in controversy and complete diversity of citizenship. The district court, relying on a "mistaken idea of procedure,"[36] remanded the case to state court. The court of appeals concluded that it had jurisdiction to review the order to remand and directed the district court to hear the case.[37]

The necessity for appellate review is further strengthened in those cases in which the remand order is clearly outside the scope of the removal statutes.[38] The statutes provide that all cases which involve laws of the United States or diversity and the requisite amount in controversy shall be removable to the federal court in all but expressly stated situations.[39] Despite these provisions, some district courts have fashioned orders out of whole cloth in returning federal litigation to state courts, even in cases where removal was unquestionably proper. Such decisions clarify the indispensable need for appellate review of remand orders in all litigation and provide a compelling argument for amendment of the removal statutes to explicitly provide for such redress.

II. Examples of Abuse of Discretion and Error

Some of the most appropriate illustrations of clear disregard for the statutory language of the removal act through either abuse of discretion or judicial error are found in remands of cases falling within the ambit

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[33] Rachel v. Georgia, 342 F.2d 336, 337 n.1 (5th Cir. 1965), *aff'd*, 384 U.S. 780 (1966).

[34] *E.g.*, Fosdick v. Dunwoody, 420 F.2d 1140, 1141 (1st Cir. 1970); Cooper v. Alabama, 353 F.2d 729, 729 (5th Cir. 1969); Robinson v. Florida, 345 F.2d 133, 134 (5th Cir. 1965) (per curiam).

[35] 85 F.2d 856 (3rd Cir. 1936).

[36] *Id.* at 859.

[37] *Id.* at 859-60. *But see Ex parte* Bopst, 95 F.2d 828, 829 (4th Cir. 1938) ("no ground of distinction in the fact that the impropriety of the removal here was found to rest upon procedural rather than upon jurisdictional grounds"). *Bankers Securities Corp.* appears to rest on a technicality in the pre-1948 removal statutes which has been corrected. C. Wright, Handbook of the Law of Federal Courts § 41, at 147 n.8 (2d ed. 1970).

[38] *See, e.g.*, Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 339 (1976) (crowded docket).

[39] 28 U.S.C. § 1441(a)-(b) (1970).

of the Fair Labor Standards Act (FLSA).[40] The well-defined scope of the FLSA prohibits the shipment in interstate commerce of goods produced by employees whose wages and hours of employment do not conform to the standards established by the Act.[41]

Actions under the FLSA are removable under the general removal statute, 28 U.S.C. § 1441. This section provides that unless there is an express law to the contrary,[42] a civil action may be removed if the federal courts have original jurisdiction.[43] Removal of suits under the FLSA is not precluded by statute.[44]

The jurisdictional section of the FLSA provides generally that such actions may be "maintained" in any state or federal court of competent jurisdiction.[45] Prior to the 1948 amendment[46] to 28 U.S.C. § 1441(a), which introduced the language allowing removal "except as otherwise expressly provided by Act of Congress," the courts were split on whether or not the word "maintained" permitted removal of cases under the Act.[47] Since the statute's amendment, however, there has been a strong trend in favor of granting removal of these cases, although there are exceptions.[48]

A leading decision emanating from the Northern District of Mississippi is exemplary of this trend.[49] The plaintiff asserted an FLSA action in state court against his former employer. The defendant removed and the plaintiff sought remand asserting that the "maintained" language of the FLSA should be construed to mean that a competent court

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[40] 29 U.S.C. §§ 201-219 (Supp. V 1975).

[41] *See id.* § 206 (minimum wage); *id.* § 207 (Supp. IV 1974) (maximum hours); *id.* § 215 (1970) (proscriptions).

[42] 28 U.S.C. § 1445 (1970) provides that suits against railroads or common carriers and state workers' compensation claims are not removable. Other statutes contain their own nonremovability provisions. *See, e.g.*, 15 U.S.C. § 77v (1970) ("No case arising under this subchapter and brought in any State court . . . shall be removed . . . .").

[43] Original jurisdiction of the federal district courts is set out in 28 U.S.C. § 1331, *as amended by* Pub. L. No. 94-574, § 2, 90 Stat. 2721 (1976) (establishes the requisites for federal question jurisdiction), and 28 U.S.C. § 1332, *as amended by* Pub. L. No. 94-583, § 3, 90 Stat. 2891 (1976) (provides for federal jurisdiction over diversity cases).

[44] *See* 28 U.S.C. § 1445 (1970) (general nonremoval statute); 29 *id.* §§ 201-219 (Supp. V 1975) (FLSA). See note 42 *supra*.

[45] 29 U.S.C. § 216(b) (Supp. V 1975).

[46] Judiciary and Judicial Procedure Act of 1948, ch. 646, § 1, 62 Stat. 869 (codified at 28 U.S.C.).

[47] *See, e.g.*, Johnson v. Butler Bros., 162 F.2d 87, 89-90 (8th Cir. 1947) (removal not allowed); Swettman v. Remington Rand, Inc., 65 F. Supp. 940, 944 (S.D. Ill. 1946) (removal permissible). *Swettman* contains an extensive delineation of pre-1948 case treatment. *Id.* at 941 n.1.

[48] *See, e.g.*, Rolon v. Flexicore Co. of Puerto Rico, Inc., 216 F. Supp. 954 (D.P.R. 1963) (removal disallowed citing Johnson v. Butler Bros., 162 F.2d 87 (8th Cir. 1947)).

[49] Hill v. Moss-American, Inc., 309 F. Supp. 1175 (N.D. Miss. 1970).

should not be deprived of its jurisdiction over a case after inception. The court noted that section 1441 allows removal "except as otherwise *expressly* provided by Act of Congress:"

> It is significant to us that in all other cases of original jurisdiction where Congress has denied removability, it has done so in clear and unmistakable words.
>
> . . . By the amendatory langauge of § 1441(a) removal jurisdiction exists in any case of which the federal district court has original jurisdiction except as otherwise *expressly* provided by Act of Congress. The command of this language is indisputably clear so that nothing short of an express statutory provision may preclude removal. This renders, in our view, irrelevant the correct meaning of the word "maintain" . . . . We must reject a construction of a word or words which would imply a Congressional intent against removal since Congress itself has plainly declared that the denial of removal must be "expressly provided."[50]

The court denied remand after determining that it is the prerogative of Congress, and not the courts, to adopt legislation proscribing removal.[51]

Other courts have generally been in accord with this theory. In *Niswander v. Paul Hardeman, Inc.*,[52] an FLSA action initially filed in an Arkansas state court was removed by the defendants. Because there was no diversity of citizenship present, the plaintiff sought to remand the case to a state forum, contending that the language of the Act which allowed litigation to "be maintained in any court of competent jurisdiction" provided plaintiffs with an election between the state and federal tribunals. The district court held that a suit under the FLSA is an action arising under an act of Congress which may be brought originally in federal court without regard to the amount in controversy, and that the case was properly removed.[53] In arriving at its conclusion, the court determined that "Congress did not mention suits under the Fair Labor Standards Act in § 1445, [54] which it could have done easily had it desired to prevent the removal of such suits."[55]

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[50] *Id.* at 1177-78 (footnote omitted).

[51] *Id.* at 1178.

[52] 223 F. Supp. 74 (E.D. Ark. 1963).

[53] *Id.* at 75. In overruling the plaintiff's motion to remand, the court stated:

> [T]he phrase "may be maintained in any court of competent jurisdiction" . . . does not amount to an express prohibition of removal, and . . . under the present removal statute a Fair Labor Standards Act case is removable from a State to a federal court.

Id. at 76.

[54] 28 U.S.C. § 1445 (1970) (general nonremovability statute). See note 41 *supra*.

[55] 223 F. Supp. at 76.

In another FLSA action,[56] the plaintiffs moved for remand contending that suits under the Act were nonremovable and obtained the following response:

> In the Fair Labor Standards Act, this court finds no language that can fairly be construed as destroying removability. The words, "may be maintained in any court of competent jurisdiction," remove any objection that might have arisen to exercise of jurisdiction by state courts. . . . Those words give to a plaintiff his choice of forum. They do not, however, guarantee that his choice shall remain undisturbed. As the claim he asserts is a federal one, his choice is subject to being upset by the defendant. . . . The Fair Labor Standards Act does not expressly provide otherwise, as it could have done by declaring that actions commenced in state courts shall not be removed.[57]

It is clear, therefore, that most of the post-1948 courts are in accord with the better rule that actions commenced under the FLSA are removable and that motions to remand the same should be denied.[58]

Nevertheless, a disregard for the cardinal principles of statutory construction permeated the holding in *Wilkins v. Renault Southwest, Inc.*[59] Upon removal the district court concluded that Congress had expressly provided against removal by the use of the word "maintained." Remand was ordered upon the belief that FLSA suits are generally for small sums, $3000 in *Wilkins,* and that removal increases costs disproportionately where the federal court is some distance from the plaintiff's residence.[60] It should be noted that neither of the aforementioned grounds are set forth in section 1447 of the removal statutes. Moreover, the precedential value of *Wilkins* is further strained since a prior case in the same district had reached the contrary conclusion that the word "maintained" did not deprive the defendant of his right to removal.[61] At best *Wilkins* can be considered a maverick, rejected by a sister court in the Fifth Circuit[62] and severely criticized in another recent decision

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[56] Buckles v. Morristown Kayo Co., 130 F. Supp. 555 (E.D. Tenn. 1955).

[57] *Id.* at 556.

[58] Other cases so holding include, *e.g.*, Anthony v. West Coast Drug Co., 331 F. Supp. 1279, 1280-81 (W.D. Wash. 1971); Rossi v. Singer Sewing Mach. Co., 127 F. Supp. 53, 54 (D. Conn. 1954); Green v. Fluor Corp., 122 F. Supp. 224, 224 (S.D.N.Y. 1954); Korrell v. Bymart, Inc., 101 F. Supp. 185, 185 (E.D.N.Y. 1951).

[59] 227 F. Supp. 647 (N.D. Tex. 1964).

[60] *Id.* at 684.

[61] In Harris v. Reno Oil Co., 48 F. Supp. 908, 908 (N.D. Tex. 1943), a situation highly analogous to *Wilkins*, the plaintiff sought damages of $4,000.00 in the state court, and the defendant removed. The federal court stated that there was nothing in the FLSA which deprived a nonresident of the right to remove a case and, further, that there was no indication that Congress had intended to deprive the defendant of such a right.

[62] Hill v. Moss-American, Inc., 309 F. Supp. 1175, 1177 n.7 (N.D. Miss. 1970). See notes 49-51 *supra*.

outside the circuit.[63] What is most significant about *Wilkins*, however, is that the defendants had absolutely no opportunity to obtain appellate review of a clearly erroneous decision and were thus required to litigate federal questions in the state courts.

Another Fifth Circuit FLSA case disregarding the language of the removal statutes is *Carter v. Hill & Hill Truck Lines, Inc.*[64] In *Carter*, the court relied heavily on *Wilkins*, even as it recognized that "most courts now [hold] that Fair Labor cases are removable"[65] and that most treatise writers endorsed the same view.[66] Nevertheless, the court concluded that because no litigant had advanced "a highly persuasive case that Congress intended these cases to be removable, this court will not accept removal jurisdiction."[67] It is obvious that the *Carter* court suffered from misguidance. The removal statutes state unequivocally that unless there is an *express* act of Congress proscribing removal, *any* civil action may be removed to the federal court. Because of the misplaced burden of proof and the lack of deference to statutory language in *Carter*, once again the unsuccessful opponents of a remand order were not allowed to present their case to the Fifth Circuit. The circuit, of course, has never decided the issue since such orders are not subject to direct appeal.

Other statutes have suffered comparable treatment by the district courts with resulting forced litigation of federal claims in state forums. The Consumer Credit Protection Act[68] also allows pertinent actions to be brought in courts of competent jurisdiction.[69] In *Ruth v. Westinghouse Credit Co., Inc.*,[70] for example, the court denied 1441's permissive removal language and circumvented the intent behind the removal statutes by relying upon outdated cases remanding FLSA litigation.[71]

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[63] In Anthony v. West Coast Drug Co., 331 F. Supp. 1279, 1280-81 (W.D. Wash. 1971), *Wilkins* was reviewed and strictly disapproved as being erroneously influenced by language in the legislative history of 28 U.S.C. § 1445 (1970), the nonremovability statute.

[64] 259 F. Supp. 429 (S.D. Tex. 1966).

[65] *Id.*

[66] *Id.* at 430.

[67] *Id.*

[68] 15 U.S.C. §§ 1601-1681t (Supp. V 1975), *as amended by* Acts of March 23, 1976, Pub. L. No. 94-240, § 2, 90 Stat. 257, and Pub. L. No. 94-239, § 1(b), 90 Stat. 251.

[69] 15 U.S.C. § 1681p (1970).

[70] 373 F. Supp. 468 (W.D. Okla. 1974).

[71] The court relied on three cases, all predating the 1948 version of § 1441, which introduced the express exceptions language. *See* Booth v. Montgomery Ward & Co., 44 F. Supp. 451, 455-56 (D. Neb. 1942) ("maintained" means continued; FLSA should be construed liberally for the plaintiff; express exceptions not required by § 1441); Kuligowski v. Hart, 43 F. Supp. 207, 207-08 (N.D. Ohio 1941) ("maintained" means continued; FLSA should be construed liberally for the plaintiff); Wingate v. General Auto Parts Co., 40 F. Supp. 364, 365-66 (W.D. Mo. 1940) (same). See notes 46 & 47 and accompanying text *supra*.

None of these lower courts' denials of the language of the removal statutes, reliances upon anachronous case authority or tendencies to prefer a construction of semantics rather than congressional purpose were subjected to appellate review. Had they been, the weight of authority would require their reversal. Even if not, certainly each case should have received full appellate scrutiny so as to effect the administration of justice and preserve uniformity of precedent. Since exploration of this issue is currently in progress, perhaps such wooden constructions of the removal statutes will be eliminated or substantially reduced.

III. Recent Developments Affecting Appellate Review of Remand Orders

A. Thermtron: *The Fountainhead*

Recent decisions affecting appellate treatment of remand orders have advanced and delineated the potential for review. At a time when the federal court dockets are on the increase, this issue should be finally resolved in order to facilitate the interests of justice. As a start, the United States Supreme Court has expanded the potential for review of remand orders in the landmark decision of *Thermtron Products, Inc. v. Hermansdorfer.*[72] *Thermtron* began as a state court personal injury action against nonresidents which the defendants removed and proceeded with discovery. Approximately nine months later the district court *sua sponte* entered an order which stated that upon review of its civil docket, it had determined there was insufficient time to try the lawsuit and that the case could move more expeditiously in state court. The defendants, ordered to show cause why a remand order should not issue, responded that they could not receive a fair and impartial trial before the state arbiter, that the case had been properly removed to federal court and that they had a federal right to proceed before that court. While expressly recognizing the defendants' right of removal, the district court nevertheless remanded the case on the ground that the plaintiffs' rights were being impaired. The Court of Appeals for the Sixth Circuit denied the defendant's petition for writ of mandamus, holding that it had no jurisdiction to entertain the petition under section 1447(d).

The United States Supreme Court, in declaring that "the right to remove has never been dependent upon the state of the federal court's docket," couched its disapproval of the district court's action in the following language:

> [A]n otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an

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[72] 423 U.S. 336 (1976), *noted in* 45 U. Cinn. L. Rev. 288 (1976).

> action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason.[73]

The Court did, however, reiterate the principle that where the trial court merely recites that the case has been "removed improvidently and without jurisdiction," the remand order is not subject to challenge by appeal, mandamus or otherwise.[74] The apparent import of this language is that had Judge Hermansdorfer not exercised considerable candor in his remand order and merely recited the "magic words," *with or without* any foundation for them, then no appellate jurisdiction could have been invoked in *Thermtron*. Instead, he cited "plainly irrelevant" grounds which were outside the joint construction of subsections 1447(c)[75] and (d) and suffered severe criticism from the Court along with the return of a case that he obviously did not want.

Of more significance to this discussion, however, was the manner in which the *Thermtron* Court justified its review of the case. In holding that a writ of mandamus is an appropriate remedy by which to require the district court to entertain the remanded action,[76] the Court stated:

> [W]e are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute. . . . Because the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the writ of mandamus was not barred by § 1447(d).[77]

The Court emphasized, however, that its decision was not to be read as an authorization of reviewability except for remands clearly not within the scope of section 1447(c).[78] *Thermtron* thus laid the foundation for appellate review by mandamus while simultaneously circumscribing the limits of such a procedure.

Justice Rehnquist authored a vigorous dissent[79] which initially fo-

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[73] 423 U.S. at 344.

[74] *Id.* at 343. *See generally* 12 WAKE FOREST L. REV. 1031 (1976).

[75] 28 U.S.C. § 1447(c) (1970) provides in part: "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs."

[76] Mandamus is also the proper remedy when a transfer of a case has been ordered in contravention of the limitations of the general venue statute, 28 U.S.C. § 1404 (1970). Van Dusen v. Barrack, 376 U.S. 612, 615 n.3 (1964); Skil Corp. v. Millers Falls Co., 541 F.2d 554, 557 (6th Cir.), *cert. denied*, 429 U.S. 1029 (1976); Johnson & Johnson v. Picard, 282 F. Supp. 386, 388 (6th Cir. 1960).

[77] 423 U.S. at 351.

[78] *Id.* at 352.

[79] *Id.* at 353-361 (Rehnquist, J., dissenting).

cused criticism on allowing any appellate review of remand orders. But if appellate review is to be condoned at all, he argued alternatively, opponents of remand orders should also be permitted to attack orders in those cases where the language of section 1447(c) is used as a "sham" or where the record reflects that the district court's denial of jurisdiction is "absurd."[80] Finally, the dissent contended that one's perception of justice in a particular case is irrelevant where "Congress decided that potential errors in individual cases did not justify permitting litigants to challenge remand orders."[81]

Both the majority opinion and the dissent in *Thermtron* deserve attention since each suggests in a limited manner the need for appellate review of remand orders. The majority's inconsistent handling of preexisting standards and its efforts to transform this departure from precedent into a workable solution is not wholly compatible with the interests of justice. Certainly the result obtained in *Thermtron* was correct, and the invocation of mandamus in order to redress the error was justified. But the limitations on review of all remand orders are less sound. The Court must ultimately confront the very abuses against which the *Thermtron* dissent cautioned, and legislative and judicial lawmakers must retreat from the fictions advanced in support of nonreviewability.

B. *In re* Southwestern Bell Telephone Company: *The Limitations on* Thermtron

The Court of Appeals for the Fifth Circuit followed a progressive course in its handling of *In re Southwestern Bell Telephone Co.*[82] only to be reversed by the Supreme Court.[83] The case began as a tort suit in the Texas state courts. By filing an amended petition which omitted a previously named defendant, the plaintiffs created diversity of citizenship among the litigants, and the defendants subsequently exercised their right to remove. Although it noted its crowded docket and the impossibility of an early trial, the district court declined to remand the case.[84] In response to the plaintiff's suggestion that the case be remanded to state court since such an order would not be subject to appellate review, the district court stated:

> The idea that any court should act in a particular way because its decision would not be appealable is repugnant to the basic principle of our system of justice that this is a government of laws, not of men. If

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[80] *Id.* at 357.
[81] *Id.* at 360-61.
[82] 542 F.2d 297 (5th Cir. 1976) (en banc).
[83] Gravitt v. Southwestern Bell Tel. Co., 97 S. Ct. 1439 (1977).
[84] 396 F. Supp. 948, 951 (W.D. Tex. 1975).

anything, even greater care and caution should be exercised by a "court of last resort" in the decision-making process.[85]

Approximately one year later the plaintiff presented an eight-year-old sworn pleading from an unrelated case in which one of the defendants had indicated that it had its principal place of business in Texas.[86] The trial court relied upon the Texas procedural device of judicial estoppel[87] and held that the defendant was estopped from asserting its Missouri domicile for diversity purposes. The case was remanded, and the defendants perfected a mandamus proceeding to the Fifth Circuit.

On initial hearing, the circuit agreed that the appropriate review procedure was mandamus and then held that the district court could not use the doctrine of judicial estoppel as the basis for deciding that a case is removed improvidently and without jurisdiction.[88] According to the court, the doctrine of judicial estoppel had "never been employed to prevent a party from taking advantage of a federal forum when . . . the statutory requirements of federal jurisdiction" were met.[89] Because the defendants had a constitutional and statutory right to a federal forum,[90] a writ of mandamus was issued directing the district court to make a "suitable inquiry" into the diversity question. The circuit affirmed its opinion on rehearing but dispensed with the "suitable inquiry" instructions since the action should "not be impeded with any further efforts by the plaintiff to avoid federal jurisdiction on insubstantial grounds."[91] The dissent agreed that the district court had dealt harshly with the defendants and that it had decided the issue incorrectly.[92] But it argued that since the district court had remanded for lack of diversity, both appellate jurisdiction and review by mandamus were precluded by section 1447(d). The United States Supreme Court reversed, holding that section 1447(d) allows no review when the district court concludes that it is without jurisdiction and remands a case.[93] In addition, the Court reemphasized the *Thermtron* standard that remands made pursuant to 1447(c) are not reviewable, thereby strengthening the "magic language" doctrine.

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[85] *Id.* at 951 n.1.

[86] 416 F. Supp. 830, 831 (W.D. Tex. 1976).

[87] Under the theory of judicial estoppel, a party may be estopped to rely upon a particular fact if his prior sworn pleadings in a former proceeding are contrary to the matters sought to be established. Long v. Knox, 155 Tex. 581, 291 S.W.2d 292, 295 (1956).

[88] *In re* Southwestern Bell Tel. Co., 535 F.2d 859, 860-61 (5th Cir. 1976).

[89] *Id.* at 861.

[90] *Id. See* Terral v. Burke Constr. Co., 257 U.S. 529, 532 (1922) (affirming the "constitutional right to resort to the federal courts").

[91] *In re* Southwestern Bell Tel. Co., 542 F.2d 297, 298 & n.1 (5th Cir. 1976) (en banc).

[92] *Id.* at 299 (Hill, J., dissenting).

[93] 97 S.Ct. 1439 (1977).

Southwestern Bell is particularly disappointing in that the Supreme Court placed emphasis exclusively on rote recitation of language and gave no consideration to the erroneous decision-making process underlying the remand order. Certainly if remand orders based on clogged dockets deserve appellate consideration, so do those which result from mere recitation of a formula when the facts speak otherwise. The very hazards predicted in Justice Rehnquist's *Thermtron* dissent have thus come to pass, and a significant retreat will now be necessary to remedy such inadequacies.

C. *The Aftermath of* Thermtron

Since the advent of *Thermtron,* the authorities considering remand orders have continued to grapple with the problem of reviewability. In *Robertson v. Ball,*[94] the district court expressly stated that the case was improvidently removed under the removal statutes. The Fifth Circuit determined that the district court's use of the statutory language in its remand order had *robbed* the circuit of the occasion to review the merits of the order and that section 1447 does "not mean exactly what it seems to say."[95] Another court has expressed comparable frustration with the limitations of appellate review, referring to the removal rules as "arbitrary."[96] The courts have generally declined to review remand orders which do not fall within the narrow legalisms of *Thermtron.*[97] Ironically, these courts have paid lip service all the while to the principles that the mere possibility of prompt resolution before the state courts cannot deprive a defendant of the choice of a federal forum,[98] and that heavy case loads can have no bearing on selection of such a forum.[99]

The potential for corrective review of the current status of remand orders and their appellate treatment was again presented in *Volvo of*

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[94] 534 F.2d 63 (5th Cir. 1976).

[95] *Id.* at 65.

[96] American Fidelity Fire Ins. Co. v. United States Dist. Court, 538 F.2d 1371, 1376 (9th Cir. 1976).

> When arbitrary or set rules are established for the orderly administration of justice, there will be times when the required course is neither the smoothest nor the most convenient. In establishing the general rule that only final judgments are reviewable, Congress contemplated that some individual conveniences would be sacrificed for the greater overall effectiveness and efficiency of the appellate process.

Id.

[97] *E.g.*, Midland Morgtgage Co. v. Weinner, 532 F.2d 1342, 1344 (10th Cir. 1976); London v. United States Fire Ins. Co., 531 F.2d 257, 259-60 (5th Cir. 1976).

[98] Lincoln Assocs. Inc. v. Great Am. Mortgage Investors, 415 F. Supp. 351, 353 (N.D. Tex. 1976).

[99] Griffin v. Hooper-Holmes Bureau, Inc., 413 F. Supp. 107, 108 (M.D. Fla. 1976).

America Corp. v. Schwarzer,[100] a class action based upon California anti-trust laws. Defendant Volvo removed, and the plaintiffs' subsequent motion to remand was denied by the United States Magistrate who found the requisite diversity of citizenship and amount in controversy. The district court, however, focused upon the latter and concluded that the action could not be maintained in federal court on behalf of the entire class even though several class members had claims in excess of $10,000.[101] When the Ninth Circuit declined to issue writs of mandamus or prohibition, Volvo sought a stay order from Justice Rehnquist, the Circuit Justice for the Ninth Circuit and the dissenter in *Thermtron.* He denied the stay order,[102] applying *Thermtron,* since Judge Schwarzer had cited section 1447(c) while disclaiming jurisdiction. He also noted that the stay was not granted since certiorari would probably be denied.

The thrust of Volvo's subsequent application for certiorari was that even though the district court had recited the 1447(c) formula, the court's conclusions should be open to review. The *Volvo* case provided the Court with the perfect vehicle by which it could settle *Thermtron's* open-ended issues and afford an adequate remedy for the defendant who properly and justifiably selects the federal forum. Nevertheless, the Court declined to review the case,[103] thereby impliedly expressing satisfaction with the current confused state of the law.

IV. Conclusion

A considerable amount of responsibility must reside in the wide discretion of a federal district court's exercise of remand powers,[104] and certainly most courts will properly consider the issues and order accordingly. When the district court errs in its order or abuses its discretion, there is no sound basis for precluding appellate review. While the potential for delay is the very basis for limiting appeals, the district judge in *Thermtron* who sought to lessen delay was soundly reversed.

Of more importance is the elimination of dissatisfaction by the general public with our system of jurisprudence, a goal which can best

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[100] 97 S. Ct. 1327 (1977) (denial of certiorari).

[101] Petition for certiorari at 3-7, Volvo of America Corp. v. Schwarzer, 97 S. Ct. 1327 (1977).

[102] Volvo Corp. of America v. Schwarzer, 429 U.S. 1331 (Rehnquist, Circuit Justice, 1976).

[103] 97 S.Ct 1327 (1977).

[104] *See, e.g.,* Glaziers Local 1928 v. Florida Glass & Mirror of Jacksonville, Inc., 409 F. Supp. 225, 225 (M.D. Fla. 1976), where the court fully analyzed the plaintiff's claims and refused remand despite the plaintiff's attempts to hide the federal labor law preemption by couching its claims in state court tort claims.

be accomplished by reducing the possibility for error and increasing the likelihood of uniformity of decisions. Congress should seriously consider repeal or amendment of the removal statutes to allow appellate review of remand orders. In the interim the judiciary should, at a minimum, reduce the complexity of this issue by inquiring through mandamus into the grounds underlying those remands which do nothing more than recite the "improvidently removed" and "without jurisdiction" language. Such a policy may result in the ultimate reduction of delay in the federal courts and even the elimination of unnecessary litigation. It will certainly have the salutory consequences of abrogating the abuses which permeate this area of the law and ultimately advancing the interests of justice.

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COMMENTS

RETIREMENT PLANS FOR THE SELF-EMPLOYED: THE KEY TO THE PROMISED LAND?

Rallying to Representative Eugene J. Keogh's call for equal treatment,[1] thousands of sole proprietors and partners lobbied Congress to secure the first program of limited tax benefits for self-employed individuals' retirement plans.[2] In succeeding years, the benefits have increased dramatically to the point where a maximum of $7,500 may now be deducted from gross income annually as a result of contributions to a plan, while taxes and interest on the contributions can be postponed or even completely avoided.[3] Although the tax-related benefits remain inferior to those accorded corporate plans, the recently expanded benefits combine with additional factors to assault the citadel of professional corporations.[4]

A true tax progeny, the self-employed individual's retirement plan is buttressed by seemingly incomprehensible rules.[5] Yet, a plan's rudi-

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[1] Today, the self-employed lawyer can give up his private practice and go to work for a big corporation and get every benefit that we want to give him under the law. I want him and the millions of others to get this benefit and yet remain a self-employed practitioner.

Keogh, *Tax Equity for the Self-Employed*, 47 A.B.A.J. 665, 667 (1961).

[2] In 1957, the American Thrift Assembly of Ten Million Self-Employed was formed to support the proposals in Congress. Consisting of representatives of interested groups of self-employed people, it was effective in mobilizing "grass roots" support for the bill. Rapp, *The Quest for Tax Equality for Private Pension Plans: A Short History of the Jenkins-Keogh Bill*, 14 TAX L. REV. 55, 70 n.50 (1958).

[3] See section III. *B., C.* 1. *infra*.

[4] The question of professional corporations as compared with Keogh plans is beyond the scope of this Comment. An excellent and instructive debate, however, arose between two pension plan experts in the foundling days of professional corporations. *Compare* Bittker, *Professional Service Organizations: A Critique of the Literature*, 23 TAX L. REV. 429 (1968) *and* Bittker, *Professional Associations and Federal Income Taxation: Some Questions and Comments*, 17 TAX L. REV. 1 (1961) *with* Grayck, *Professional Associations and the Kintner Regulations: Some Answers, More Questions and Further Comments*, 17 TAX L. REV. 469 (1961). Comparisons of Keogh plans and corporate plans are readily available in tabular form, *e.g.*, Griswold, *Tax Fairness for the Self-Employed*, 44 J. CLEV. B.A. 186 (1973); White, *Corporate vs. Keogh Plans; A Tabular Comparison*, 2 PENSION & PROFIT-SHARING TAX J. 339 (1976), and as textual discussion, *e.g.*, Snyder & Weckstein, *Quasi-Corporations, Quasi-Employees and Quasi-Tax Relief for Professional Persons*, 48 CORNELL L.Q. 613 (1963); Thies, *Keogh Plan v. Qualified Corporate Plan: An Analysis of the Respective Advantages*, 42 J. TAX. 9 (1975); Worthy, *IRS Chief Counsel Outlines What Lies Ahead for Professional Corporations*, 32 J. TAX. 88 (1970); Zalutsky, *An Analysis of the Post-ERISA Advantages of Incorporation for the Professional*, 42 J. TAX. 240 (1975); Note, *Professional Corporations and Associations*, 75 HARV. L. REV. 776 (1972).

[5] *See, e.g.*, I.R.C. § 412 (prohibition against accumulated funding deficiencies).

ments are not difficult to grasp, and the practicing attorney will find that in terms of service to himself and his clients his time will have been well spent. There are innumerable guides for the inquisitive, including the Internal Revenue Code,[6] various condensations and interpretations of the Code's particular sections,[7] and packaged plans that often require little more than the prospective participant's signature.[8]

This Comment is intended to assist the Mississippi attorney in understanding the fundamentals of a Keogh plan. After discussions of the underlying policies and historical background, a plan's basic requirements will be pinpointed and explained. The concluding sections will compare selected packaged plans currently available in the state and ultimately suggest a procedure for evaluating a particular Keogh proposal.

I. Policy Considerations

The recent economic trend in the United States reflects a growing dependence on a few productive workers using sophisticated capital equipment to sustain the unproductive majority.[9] The funds required for such capital investment have historically been provided by private and institutional savings.[10] Recognizing the economy's dependence on accumulating funds for investment, however, the federal government has undertaken to encourage such savings by providing current tax benefits and guarantees of payments at retirement.[11] Unfortunately, steady shrinkage in the number of productive workers capable of accumulating savings and their increasing tax burden has forced mounting concern over the future sources of capital funds.[12]

Although they are a substantial portion of the productive few, professionals have not been accorded the same retirement advantages as

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[6] *Id.* §§ 72, 401-415, 501, 4971, 4972.

[7] Both books and looseleaf services are available. *Books:* M. Canan, Qualified Retirement Plans (1977); 1 Michie's Federal Tax Handbook (39th ed. 1977); S. Murray, Analysis of the Pension Reform Act of 1974. *Looseleaf services:* Pens. Plan Guide (CCH); Pens. and Profit-Sharing (P-H); 311 Tax Mngm't (BNA).

[8] See notes 138 through 172 and accompanying text *infra*.

[9] Siegfried, *The Role of Private Pensions*, in Private Pensions and the Public Interest 7, 12 (1970).

[10] *Id.* at 12-13. Institutional savings are usually some form of pension or profit-sharing plan. *Id.*

[11] *Id.* at 15. Previously, the federal government's role in pension regulation had been limited to efforts to protect its tax revenues. However, spectacular pension fund failures such as the Studebaker plan collapse cost thousands of workers their guaranteed benefits and prompted the government to assume a more active role. See notes 44 through 48 and accompanying text *infra*.

[12] *Id.* at 13.

other workers.[13] The disparity in tax benefits might be more palatable if the law had evolved from considerations of such factors as the economic value of encouraging the self-employed business form, balancing a professional's earned income and investment income, and the importance of allowing professional income to be sheltered.[14] Instead, the initial discrimination was an accidental by-product of Congress' attempt to correct existing corporate inequities. Slowly, amid some controversy, the self-employed's value is being recognized and protected.[15]

II. History

"Barred from entry into qualified plans, professional people have sought some type of admission ticket to the promised land."[16] Attorneys, who see no reason for discriminatory treatment, have led a crusade advocating tax parity since 1945.[17] While parity remains a seemingly unreachable goal, significant strides have reduced the distance.

The costs of winning concessions from Congress have been excessive. Six years after the first informal group of lawyers met to discuss proposals for guaranteeing pension coverage for all working individuals,[18] the first proposal was submitted by Representative Keogh.[19] Incorporated in the proposed legislation were recommendations garnered from two independently prepared proposals and a report by three bar association committees.[20] The bill would have allowed all taxpayers to

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[13] Retirement plan inducements unavailable to Keogh plans are a $5,000 non-taxable death benefit for the employee's surviving spouse, plan medical insurance paid with deductible premiums and larger permissible contributions and deductions. For discussions of corporate plans and their advantages, see note 4 *supra*.

[14] *See generally* Bittker, *Professional Associations and Federal Income Taxation: Some Questions and Comments*, *supra* note 4, at 28.

[15] Note, *Tax Parity for Self-Employed Retirement Plans*, 58 Va. L. Rev. 338, 339 (1972).

[16] Grayck, *supra* note 4, at 470.

[17] Rapp, *supra* note 2, at 57. In a later article, Rapp continues his history through 1962. Rapp, *The Self-Employed Individuals Tax Retirement Act of 1962*, 18 Tax L. Rev. 351 (1963).

[18] The lawyers were as much concerned about corporate employees not covered by a qualified plan as they were about the plight of the professional. Rapp, *supra* note 2, at 60. Their efforts in favor of excluded employees were fruitless until 1974 when Individual Retirement Accounts, I.R.C. § 408, were made available for any person not covered by a qualified plan.

[19] Rapp, *supra* note 2, at 60. A bipartisan bill was introduced at the same time by Representative Reed. He was replaced later by Representative Jenkins. *Id.* at 63. For a detailed discussion of the original bill's major provisions, see Note, *Favorable Tax Treatment for Individual Pension Plans: The Jenkins-Keogh Bill*, 66 Harv. L. Rev. 1105 (1953).

[20] Rapp, *supra* note 2, at 58-60. The independent proposals were formulated in Silverson, *A New Tax Proposal*, 44 Am. Mercury 345 (1947), and Rudick, *More About Pensions for Partners: A Better Solution than Pension Plans?*, 33 A.B.A.J. 1001 (1947). The three

utilize its provisions and guaranteed an annual deduction of 10% of the taxpayer's earned income up to $7,500.[21] The earliest age at which distributions could be received without penalty was sixty years.[22] It was not the equal of contemporary corporate plan benefits, but the arbitrary exclusion of professionals was alleviated by allowing all-inclusive participation.

Significant reductions in the bill's scope were made before its approval by the House of Representatives in 1958.[23] HR10[24] allowed only self-employed individuals to participate[25] and lowered the annual deduction to 10% of the self-employed's net earnings with a maximum of only $2,500.[26] Additionally, a total lifetime deduction of $50,000 was imposed, and distributions could not begin after seventy and one-half years of age.[27]

In addition to legislative consideration of HR10, a new avenue for self-employed retirement relief was opened in *United States v. Kintner*.[28] *Kintner*'s ruling that a group of doctors could qualify as a corporation for tax purposes initiated a rush by the states to enact professional corporation statutes.[29] Although the Internal Revenue Service resisted vigorously,[30] it finally acknowledged in 1969 that professionals could incorporate and receive the retirement benefits flowing from incorporation.[31]

In 1958, the Senate began consideration of HR10. Responding to a

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committees were from the American Bar Association, the New York Bar Association and the New York City Bar Association.

[21] Rapp, *supra* note 2, at 60-61.

[22] *Id.* An exception was provided "in case of total and permanent disability certified by a licensed physician." *Id.* at 61.

[23] *Id.* at 80.

[24] The provisions concerning retirement plans are termed "Keogh plans" after its sponsor and "HR10 plans" after the number given the bill in the House of Representatives when it was passed in 1958.

[25] H.R. 10, 86th Cong., 1st Sess., 105 CONG. REC. 4261 (1959) (Self-Employed Individuals Retirement Act of 1959).

[26] *Id.*

[27] *Id.* at 4262.

[28] 216 F.2d 418 (9th Cir. 1954).

[29] By 1963, 21 states had authorized professional corporations. Note, *supra* note 15, at 418 n.29.

[30] The IRS responded to *Kintner* by formulating severe restrictions for operating a qualified professional corporation. Treas. Reg. §§ 301.7701-1 to -15 (1975). These so-called "*Kintner* Regulations" were the subject of repeated attack until 1969 when the IRS lost three cases to professional associations: Kurzner v. United States, 413 F.2d 97 (5th Cir. 1969); O'Neill v. United States, 410 F.2d 888 (6th Cir. 1969); United States v. Empey, 406 F.2d 157 (10th Cir. 1969).

[31] Technical Information Release 1019 (August 8, 1969), 3 STAND. FED. TAX REP. (CCH) ¶ 2605.422.

Senate committee inquiry, the Treasury Department decided against continued resistance and proposed a complete restructuring of the bill's format.[32] Instead of creating separate Internal Revenue Code sections, the proposed bill would have amended only the existing corporate plan requirements.[33] Thus, the effect of the transition was to turn corporate plans into Keogh plans by imposing additional restrictions.

The Joint Conference Committee eventually approved the first federally-recognized tax relief for individual retirement plans.[34] The Self-Employed Individuals Tax Retirement Act of 1962 (SEITRA)[35] was a major step in the direction of tax parity but fell significantly short of its goal. Deductions were based on net earnings from self-employment[36] as defined for taxing a self-employed individual's income.[37] The maximum annual deduction was only 5% to a ceiling of $1,250.[38] Rigid rules for participation by employees,[39] time of distribution,[40] contribution formulas[41] and prohibited transactions[42] were imposed. Most of these re-

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[32] *Pension Plans for Owner-Managers of Corporations: Hearings Before the Senate Committee on Finance*, 86th Cong., 2d Sess. 4-5 (1960).

[33] *Id.* The result of this suggestion, which is currently in effect, is an arbitrary tripartite division of Keogh plans. See notes 50 through 53 and accompanying text *infra*.

[34] The Senate Committee explained:

> Although a number of States recently have enacted new legislation to eliminate some of the obstacles to professional corporations and associations, your committee believes it desirable to provide by Federal legislation that a self-employed individual may participate . . . without becoming an artificial employee.

S. REP. No. 992, 87th Cong., 1st Sess. 8-9 (1961).

[35] Pub. L. No. 87-792, 76 Stat. 809 (1962) (amended 1974). *See generally* Grayck, *Tax Qualified Retirement Plans for Professional Practitioners: A Comparison of the Self-Employed Individuals Act of 1962 and the Professional Association*, 63 COLUM. L. REV. 415 (1963).

[36] I.R.C. § 401(c)(2)(A) (1954) (amended 1974).

[37] I.R.C. § 1402(b).

[38] The maximum contribution allowed in one section of SEITRA was 10% of net earnings up to $2,500. I.R.C. §§ 401(d)(5)(A)-(B), 404(e)(1)-(2) (1954) (amended 1974). Another provision, however, reduced the deduction by 50%. *Id.* § 404(a)(10) (1954) (repealed 1966).

[39] Full-time employees with three or more years of service were required to be covered. *Id.* § 401(d)(3) (1954) (amended 1974).

[40] Distributions before insurance age sixty (59 1/2) were not allowed except in cases of total disability and were required to begin before insurance age seventy-one (70 1/2). *Id.* § 401(d)(4)(B), (a)(9)(A) (1954) (amended 1974). These restrictions applied only to a class of self-employed individuals defined as owner-employees. See note 51 and accompanying text *infra*. All other self-employed individuals were to be governed by the existing corporate rules. I.R.C. § 401(d) (1954) (amended 1974).

[41] Severe penalties for making contributions in excess of the deductible limits were imposed. *Id.* § 72(m)(5)(A)(ii) (1954) (repealed 1974).

[42] *Id.* § 503(j)(1)(A)-(D) (1954) (amended 1974). These subsections listed certain transactions which, if engaged in by the trust, would result in loss of the trust's tax exempt

strictions were supplementary to the requirements of basic corporate plans[43] and operated to widen the distinctions between Keogh and corporate plans instead of diminishing them. Despite the weaknesses, however, no concerted reform attempt was made for more than a decade.

Twelve years after SEITRA and six years after the last change of any consequence,[44] pension law was drastically reshaped. The culprit, the Employees Retirement Income Security Act of 1974 (ERISA),[45] has become the current pension law, spanning both the Treasury and Labor Departments.[46] The new pension law represented an emphatic declaration that the government had abandoned its meek role in pension affairs in order to prevent repetition of past abuses. Indeed, Congress' announced goal in enacting ERISA was "to assure workers that they will receive the promised pension benefits earned for their retirement during their working lives."[47] Regardless of whether the goal can be achieved, ERISA has had a definite impact on retirement planning.[48]

III. Essential Elements of a Qualified Keogh Plan

The primary goals of current pension regulation are to provide an opportunity for retirement preparation to all workers and to ensure that guaranteed benefits are paid when owed.[49] Since ERISA was an amendment to the existing amalgamation of corporate and Keogh plans, attempted coverage for all workers resulted in an artificial stratification. One class of workers consists of corporate employees and is subdivided into employees who are not covered by qualified plans and those who are.[50] Self-employed individuals comprise the other group which con-

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status. I.R.C. § 503(a).

[43] *Id.* § 401(d) (1954) (amended 1974) stipulated that the requirements of subsection (d) were to be supplementary to those of subsection (a).

[44] The 50% restriction on deductible amounts contributed by a self-employed person was repealed in 1966. Pub. L. 89-809, Title II, § 204(a), (b)(2)-(3), 80 Stat. 1577 (1966).

[45] Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified in scattered sections of 5, 18, 26, 29, 31 U.S.C.).

[46] See note 127 *infra*.

[47] 119 Cong. Rec. 30003 (1973) (remarks of Senator Williams).

[48] ERISA is too young to evaluate its long range effectiveness. For an example of its current operational requirements, see notes 126 through 128 and accompanying text *infra*.

[49] The problem areas addressed specifically by ERISA were: (1) inadequate pension coverage among the entire working society; (2) discrimination against self-employed individuals; (3) applicable statutes failing to award all participants nonforfeitable rights in their pension benefits; (4) underfunded plans; and (5) the need for stricter disclosure of plan operations and condition. H.R. Rep. No. 807, 93d Cong., 2d Sess. 11-14 (1974).

[50] This distinction is a matter of choice by the employer as to whether he desires a qualified plan. If he does, then ERISA requirements must be met so that he may reap the benefits of the tax advantages. *See* I.R.C. § 401(a) (basic requirements for all plans). A similar analysis was applied to SEITRA in Note, *supra* note 15, at 339-40.

tains a special group, defined as "owner-employees."[51] The statutory framework imposes the same basic requirements in both classes but places additional limitations on the self-employed.[52] Owner-employees are subject to both sets of restraints plus another group unique to them.[53]

A. Requirements Applicable to All Qualified Plans

A qualified retirement plan consists of the plan regulations and a trust to manage the plan's assets.[54] Specific sections apply to the trust[55] and to the plan regulations,[56] but consistent with ERISA's emphasis on safeguarding plan assets, the trust is more heavily regulated.

Basic guidelines for all qualified trusts in section 401(a) of the Internal Revenue Code emphasize prevention of manipulation by the plan's sponsor. The trust cannot discriminate in favor of officers, shareholders or highly compensated employees[57] and may not allow forfeiture of plan benefits to increase other participants' accounts.[58] The trust corpus or income may only be used to satisfy plan liabilities to beneficiaries until those liabilities are paid,[59] and a spendthrift provision is required for the protection of beneficiaries.[60] Should the plan be merged with another, each participant must be guaranteed equal or greater benefits under the new plan.[61]

A plethora of supplemental sections augment the foundation of section 401(a). Specific instructions concerning minimum vesting[62] and minimum funding[63] are given. Mandatory limits on permissible benefits

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[51] Self-employed individuals are specifically regulated in I.R.C. § 401(a)(9), (a)(10), (a)(17), (c), (d). *See generally* Segal, *Keogh Plans: New Advantages Under the Pension Reform Act*, 49 FLA. B.J. 457 (1975). I.R.C. § 401(c) defines an owner-employee as an employee who owns either 100% of an unincorporated business or more than a 10% interest in either the capital or profits of a partnership.

[52] I.R.C. § 401(a) imposes the basic framework for all plans. A self-employed individual must comply with § 401(a) and, depending on his classification, with § 401(c) and (d).

[53] According to *id.* § 401(d), its requirements plus those of § 401(a) relating to general plans must be met. See section III. *C.* 1. *infra.*

[54] *See, e.g.*, I.R.C. § 401(a).

[55] *Id.* §§ 401, 415, 501, 4972.

[56] *Id.* §§ 72, 402, 404, 411, 412, 4971.

[57] *Id.* § 401(a)(4).

[58] *Id.* § 401(a)(8).

[59] *Id.* § 401(a)(2).

[60] *Id.* § 401(a)(13).

[61] *Id.* § 401(a)(12).

[62] *Id.* § 411. Minimum vesting defines the time in which an employee must be awarded nonforfeitable rights to his accrued benefits. See section III. *A.* 2. *infra.*

[63] I.R.C. § 412. The minimum amount that may be in the plan's accumulated fund is determined by the minimum funding standards. See section III. *A.* 3. *infra.*

and contributions are imposed to ensure plan integrity.[64] Contributions to a plan, income earned by the plan's assets and distributions are all subject to special rules designed to provide maximum benefits at a minimum revenue loss to the government.[65]

1. Taxation of Plan Operations

Taxation of qualified plans is designed to encourage saving for retirement. Although contributions to Keogh plans are subject to special rules when made by self-employed individuals, the provisions imposed upon a plan's income and distributions apply to all plans.

Distributions to beneficiaries may be in one of two forms.[66] The most advantageous form for the average taxpayer is a periodic distribution which allows the participant to receive a specified amount in successive periods until his benefits have been exhausted.[67] Tax is due on the pro rata amount of the distribution that represents the previously untaxed contribution.[68]

The taxpayer's advantages in selecting a periodic distribution are due to a new estate tax provision and the nature of the progressive tax rates schedule. In his peak earning years, a taxpayer pays a higher percentage of his income in taxes and consequently saves a higher percentage of every dollar he earns that is untaxed.[69] Since the majority of taxpayers are earning less and paying a lower percentage in taxes when a plan's distributions are begun,[70] the difference in the tax rate paid when the plan contribution was made and the tax rate at distribution represents savings to the participant. A change in the estate taxation of

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[64] I.R.C. § 415. See section III. *B. infra.*

[65] See notes 66 through 77 and accompanying text *infra.*

[66] I.R.C. § 402 permits only periodic or lump sum distributions. *See generally* Barker, *HR10 Plans and Lump Sum Distributions*, 9 REAL PROP., PROB. & TR. J. 446 (1970); Grayck, *Taxation of Distributions from Qualified Plans*, 28 TAX L. REV. 233 (1973); Grayck, *Taxation of Distributions from Qualified Pension or Profit-Sharing Plans*, 39 TAXES 34 (1961); Kopple & Veenhuis, *An Analysis of Lump-sum Distributions after the Pension Reform Legislation*, 42 J. TAX. 2 (1975).

[67] There are no direct restraints on the time span of a periodic distribution. However, in the case of self-employed individuals, a distribution in the form of an annuity may not exceed either the life expectancy of the participant or the participant and his spouse. I.R.C. § 401(a)(9)(B). Additionally, if an annuity is paid, it must be paid in the form of a qualified joint and survivor annuity. *Id.* § 401(a)(11).

[68] Periodic distributions are taxed as annuities. Consequently, only the portion attributable to employee contributions is taxed. *Id.* § 72(f).

[69] An individual making $50,000 per year pays a marginal rate of 50% of the amount while an individual making $25,000 is taxed at a marginal rate of 32%. *Id.* § 1(a) (assuming married individual rates). Thus, the individual making $50,000 saves 18¢ more for every dollar that escapes taxation at that level than the one making $25,000.

[70] Distributions may not begin until age 60 or later. *Id.* § 401(d)(4).

annuities has made the savings even more attractive. If the taxpayer dies before complete distribution, the resulting distribution to the participant's spouse may be completely excluded from the deceased participant's estate.[71] As a result, the participant escapes taxation of the plan accumulation completely,[72] while the spouse, who must pay the tax at distribution, is likely to pay less than the deceased's liability.

A lump sum payment is the other permissible form of distribution,[73] but only one election to receive all benefits payable at that time may be made after age sixty.[74] Income tax is applied at the advantageous long term capital gain rates to a portion of the employer's contributions to the plan with the remaining employer and employee contributions taxed as ordinary income.[75] If, as is usually the case in small Keogh plans, there are virtually no employee contributions, a lump sum distribution could result in the maximum tax savings to the beneficiary.

As an additional tax incentive, the income earned by a Keogh plan's assets is not taxed in the year received if the trust has not engaged in certain "prohibited transactions."[76] Postponement of the tax liability until distribution is a major advantage of a qualified plan and results in tax savings similar to that of an annuity distribution.[77] The advantage lies in the fact that other investments with tax exempt interest earnings

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[71] Pub. L. No. 94-455, § 2009(c), 90 Stat. 1520 (1976) (codified at I.R.C. § 2039(c)). This provision is the only significant change in pension law made by the 1976 Tax Reform Act.

[72] There is authority that contravenes the apparently clear language of I.R.C. § 2039(c) and mandates inclusion of the periodic payments. Northern Trust Co. v. United States, 389 F.2d 731 (7th Cir. 1968), used the doctrine of constructive receipt to tax the proceeds of a qualified plan. Since the decedent had the *option* of receiving a lump sum payment at retirement, his election of periodic payments did not change the fact of control over the proceeds at retirement. The court transformed this tenuous control into indirect ownership and inclusion in the deceased's estate.

[73] I.R.C. § 402(a)(2).

[74] *Id.* § 402(e)(4)(B).

[75] The amount taxed as long term capital gain is equal to the fraction:

$$\frac{\text{employer's contribution } \textit{times} \text{ years of active participation before 1/1/74}}{\text{total years of active participation}}$$

Id. § 402(a)(2). Since this computation will not allow capital gain treatment to plans initiated after January 1, 1974, a ten year forward averaging provision (spreading the income and the tax over the next ten years) may be elected to achieve a similar end. *Id.* § 402(e)(1).

[76] *Id.* § 503(b). Section 501(a) exempts the trust's income from income tax unless certain transactions occur and strip the trust of its tax-exempt status. "Prohibited transactions" include lending income or corpus from the trust without adequate security and reasonable interest charges, engaging in purchases or sales of property with the plan's sponsor for less than fair market values, and making the trust's services available to the sponsor on a preferential basis. *Id.* § 503(b).

[77] See note 68 and accompanying text *supra*.

usually pay a lower percentage interest than comparable taxed investments. By exempting a plan's income, section 501's provisions allow the taxpayer to use the higher investment returns of ordinary taxed investments with impunity.

2. Minimum Vesting Standards

For all plans except those covering owner-employees, section 411 of the Code establishes the minimum time by which a participant must be granted nonforfeitable rights to his accrued benefits under the plan.[78] The guidelines setting the minimum times distinguish between benefits accruing from employee contributions and those from employer contributions. Benefits arising from employee subsidies must be vested immediately.[79] Benefits resulting from an employer's contributions may be vested by any one of the methods outlined in the statute so long as an employee is at least 50% vested at the end of ten years of service and 100% vested at the end of fifteen years.[80] The options pertaining to an employer's contribution are not available, however, if the plan includes participants who are owner-employees.[81]

3. Minimum Funding Standards

Determining adequate funding in the present to guarantee benefits twenty or more years in the future is probably the most difficult aspect of pension operation. Section 412 of the Code offers complex funding formulas intended to ensure promised benefits by measuring current performance against statutory minimums.[82] One general proscription

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[78] Granting a participant nonforfeitable rights in his accrued benefits is termed "vesting." I.R.C. § 411(a). *See generally* Neal, *An Analysis of Newly Established Vesting Requirements under Pension Reform*, 41 J. TAX. 258, 260 (1974).

[79] I.R.C. § 411(a)(1).

[80] Neal, *supra* note 78, at 258. The three employer vesting methods listed in I.R.C. § 411(a)(2)(A)-(C) are: (1) *10-year vesting:* after at least 10 years of service an employee has 100% vesting in the benefits accruing from the employer's contributions; (2) *5 to 15 year vesting:* at the end of 5 years the employee has a 25% vested right which increases each year according to a statutory formula until after 15 years, 100% vesting is obtained; and (3) *Rule of 45:* if, after 5 years of service, the employee's age and years of service add up to 45, he receives 50% vesting. A sum of 55 equals 100% vesting after 10 years of service. An exception to the Rule of 45 is that an employee with 10 years of service must have at least 50% vesting. *Id.* § 411(a)(2)(C)(ii).

[81] *Id.* § 401(d)(2)(A). This section does not refer to employee contributions specifically but requires that "employees' rights . . . derived from the *contributions* under the plan are nonforfeitable." *Id.* (emphasis added).

[82] For a reasonably comprehensible treatment of this complicated section, see Stuchiner, *Working With the New, Tougher Funding Requirements of the Pension Reform Law*, 41 J. TAX. 272 (1974).

provides that an accumulated funding deficiency, *i.e.* an excess of current plan charges over current plan debits,[83] may not exist at the close of the plan year.[84] In cases of substantial business hardship, this requirement may be waived in five of any fifteen consecutive years.[85] If a waiver cannot be secured, a penalty tax chastises the careless.[86]

B. Requirements Applicable to All Self-Employed Individual Plans: Taxation of Plan Operations

Contributions to Keogh plans and the resulting deductions have been widely publicized because the deduction is an easily recognizable benefit. The maximum deduction available to a self-employed employer is 15% of his net earnings from self-employment with a ceiling of $7,500.[87] To qualify for the deduction, a contribution at least equal to the amount of the deduction must have been made by the employer on the self-employed's behalf, and the contribution must qualify as an ordinary and necessary business expense.[88] If a self-employed professional and his employees are covered by the same plan, the contributions made for the employees are exempt from the percentage limitation but must be justified as ordinary and necessary.[89] Employees are permitted to make voluntary contributions or may be required to contribute. In neither case, however, will a deduction be allowed.

The maximum contribution or benefit permissible depends on whether the plan is a defined contribution plan[90] or a defined benefit

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[83] Deductions from the plan's fund account would be items such as the plan's normal costs for the current year, a portion of the costs incurred by the plan prior to ERISA and the difference between estimated gains or losses used in actuarial projections and the actual gain or loss. I.R.C. § 412(b)(2)-(3). Credits to the account are the employer's and employee's contribution for the year if any contribution was made. *Id.* § 412(b)(3).

[84] *Id.* § 412(a). Note that since the measurement is made only at the close of the plan year, the fund manager is allowed some flexibility.

[85] *Id.* § 412(d)(1).

[86] Each year in which an accumulated funding deficiency arises, a penalty of 5% of the deficiency is assessed. If the deficiency is not corrected within 90 days, an additional penalty tax of 100% of the deficiency is imposed. *Id.* § 4971(a)-(b).

[87] *Id.* § 404(e)(1). This is a deduction used in computing adjusted gross income and, thus, may be used with the standard deduction. An employer may also deduct the administrative costs of maintaining his plan. Rev. Rul. 68-533, 1968-2 C.B. 190.

[88] I.R.C. § 404(a), (e). Ordinary and necessary business expenses are the subjects of a vast amount of literature and litigation. The applicable statutory provisions are *id.* §§ 162, 212.

[89] *Id.* § 404(a)(9). Otherwise, they will be supervised by the general rules of *id.* § 401(a).

[90] A defined contribution plan is "a plan which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account." *Id.* § 414(i). Essentially, this means that the plan will specify how much

plan.[91] In a defined contribution plan, the annual contribution may not exceed the lesser of $25,000 or 25% of the self-employed's net earnings from self-employment.[92] If a contribution between 15% and 25% of net income is made, however, a 6% tax on the excess may be imposed except where[93] the excess contributions are promptly returned to the contributor.[94] A defined benefit plan does not have stipulated annual contributions, but the annual benefit that it guarantees is limited to the lesser of $75,000 or the average net earnings from self-employment for the self-employed's best three years under the plan.[95] Contributions for each year are determined with actuarial methods that delineate the annual donation necessary to eventually accumulate the guaranteed benefits.

C. *Requirements Applicable to Owner-Employees*

1. Taxation of Plan Operations

Because of the potential for misuse in his favor, an owner-employee's control over his retirement plan is vigorously circumscribed, especially if he has employees covered under the same plan. In dealing with owner-employee contributions, the two separate contribution limits must still be honored, but a new problem surfaces. As an employer, an owner-employee may contribute 15% of his net earnings from self-employment up to $7,500 annually with no penalty.[96] Although employer contributions over the 25%-$25,000 limitation are prohibited in every qualified plan,[97] contributions by an owner-employee's account may not exceed the 15%-$7,500 maximum deductible amount without disqualifying the plan.[98] Furthermore, if only owner-employees are covered under the plan, total contributions *from any source* exceeding the 15%-$7,500 maximum will terminate the plan's acceptability.[99]

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must be contributed, but it makes no guarantees of the benefit.

[91] Exhibiting an unusual economy of words, the Code defines a defined benefit plan as "any plan that is not a defined contribution plan." *Id.* § 414(j).

[92] *Id.* § 415(c)(1). Only the first $100,000 in self-employed net earnings may be used in this computation. *Id.* § 401(a)(17).

[93] *Id.* § 4972(a). There are carryover provisions which take the excess contribution to the next year, apply it against that year's deduction limit, and tax the excess again. This procedure is continued until the excess contribution is exhausted. *Id.* § 4972(b). Conversely, the same procedure applies to an excess deduction limit over the deduction taken for that year. *Id.*

[94] *Id.* § 4972(b)(1)(5).

[95] *Id.* § 415(b). In 1976, § 401(j) went into effect to give self-employed professionals their first qualified defined benefit plan. To be qualified, however, the basic benefit must exceed a minimum level at all times.

[96] See note 87 and accompanying text *supra*.

[97] See note 92 and accompanying text *supra*.

[98] I.R.C. § 401(d)(5)(A).

[99] *Id.* § 401(d)(5)(B).

Since an owner-employee enjoys the dubious distinction of being both an employer and an employee for pension purposes,[100] he may, under limited circumstances, make additional contributions without penalty. If the plan includes employees of the owner-employer, and contributions are made on their behalf, an owner-employee is permitted to contribute, as an employee, 10% of his net earnings up to $2,500 on his own behalf.[101] No deduction is allowed for the contribution, and if only owner-employees are included under the plan, the contribution is not permissible.[102] The net effect of the provision is to allow an owner-employee in the right circumstances to contribute $10,000 annually to his plan without paying a penalty.[103]

An exception to the foregoing restrictions results if the Keogh plan's funds are applied to purchase an annuity, endowment contract or life insurance on the life of the owner-employee.[104] In this particular situation, the amount of any contribution that is used to provide insurance coverage is simply not considered in determining the maximum permissible contribution.[105] Likewise, it is not deductible.[106] The more relaxed standard apparently results from the owner-employee's decreased ability to misappropriate plan assets.

2. Timing of Distributions

The stages at which distributions may be made to owner-employees are also more rigidly controlled than for the ordinary plan. Distributions may not begin before fifty-nine and one-half years of age[107] and must begin by seventy and one-half years of age.[108] An exception allows distributions before the former age if the owner-employee has become disabled or has died and also allows premature distributions of benefits accruing from an owner-employee's contribution as an employee.[109] Dis-

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[100] An owner-employee is subject to limits on the contribution made as an employer, *id.* § 404(e), and as an employee, *id.* § 4972(c).

[101] *Id.* § 4972(c)(1)-(3).

[102] *Id.* § 4972(c).

[103] If his income equals $75,000, the owner-employee may contribute $7,500 as an employer and $2,500 as an employee with no penalty or disqualification and deduct $7,500.

[104] *See* I.R.C. § 401(e)(3). The $25,000 limit in § 415(c) is not applicable to plans meeting these strict requirements. *Id.* § 415(c)(7).

[105] Treas. Reg. § 1.404(e)-1A(g) (1963). The amount of contribution allocable to insurance coverage is equal to the "net premium cost" determined under *id.* § 1.72-16(b)(5) (1963).

[106] *Id.* § 1.404(e)-1A(g) (1963).

[107] I.R.C. § 401(d)(4).

[108] *Id.* § 401(a)(9). This restriction is imposed to ensure that the accumulation will in fact be used for retirement income and not as a conduit to future heirs.

[109] *Id.* § 401(d)(4), (d)(2).

tributions before fifty-nine and one-half years of age that do not qualify under the exceptions will be subject to taxation as ordinary income plus an additional penalty tax equalling 10% of the distribution,[110] and no contributions to the plan can be made for five years following the disqualified distribution.[111]

An owner-employee may elect a lump-sum or periodic distribution. If he chooses a periodic form, however, the dissemination must be complete within the actual life or life expectancy of the owner-employee or his spouse.[112] Death of the owner-employee before complete distribution activates yet another requirement: within five years after his death the payments must be completed.[113]

3. Minimum Participation and Vesting Standards

Unlike ordinary Keogh plans, plans covering owner-employees are subject to a rigid standard for including employees. When an employee completes three years of service with the owner-employee, he must be allowed to participate in the plan[114] and immediately receive nonforfeitable rights in the benefits accruing from his contributions.[115] Again, it is emphasized that the trust may not discriminate in favor of officers, directors, or highly compensated employees,[116] although section 401 specifies that excess contributions on behalf of an owner-employee are not discriminatory.[117]

4. Plan Administrator

The plan administrator is the entity designated in the plan regulations to be responsible for the management of the plan.[118] Prior to ERISA, the only qualified entity was a bank or its equivalent.[119] Presently, any organization which meets the criteria set forth in the Treasury Regulations may qualify to hold the position.[120]

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[110] *Id.* § 72(m)(5).

[111] *Id.* § 401(d)(5). Obviously, disallowing contributions for five years will seriously impair the fund's accumulation.

[112] *Id.* § 401(a)(9).

[113] *Id.* § 401(d)(7).

[114] *Id.* § 401(d)(3).

[115] *Id.* § 401(d)(2).

[116] *Id.* § 401(d)(6). See note 57 and accompanying text *supra.*

[117] I.R.C. § 401(a)(10).

[118] *Id.* § 414(g). If no adminstrator is named, then the employer or a representative group will hold the position. *Id.* If these options are not available, the entity in actual control of the assets should be named the administrator. Proposed Treas. Reg. § 11.414(g)-1(b)(4), 40 F.R. 43,036 (1975), *reprinted in* 7 FED. TAXES (P-H) ¶ 65,669.

[119] I.R.C. § 401(d)(1) (1954) (amended 1974).

[120] Treas. Reg. § 11.401(d)(1)-1 (1976). The general criteria are: (1) *Continuity*: the

The plan administrator is in a fiduciary relationship with the participant.[121] As a fiduciary, he is required to act with the skilll of a prudent person[122] and to comply with the strictures of the plan document.[123] He may not participate in section 503(b) prohibited transactions; if he does, he faces possible criminal penalties.[124] If there is more than one fiduciary, all are jointly and severally liable for any mismanagement.[125]

The administrator's other vital function is the responsibility of providing adequate disclosure of the plan's operations and current position.[126] Indeed, to comply with all the reporting and disclosure rules, an administrator must file enough reports[127] to have prompted one commentator to quip, "this is apparently Congress's answer to the paper shortage."[128]

Obviously, compliance with the myriad technical rules entails considerable time in drafting a personal plan. The result, however, is a plan

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fiduciary must demonstrate its continued ability to serve after the death of one or more of its owners (this provision eliminates individuals as trustees); (2) *Established location*: the place must be one where the fiduciary is accessible every business day; (3) *Fiduciary experience*; (4) *Fiduciary responsibility*: the fiduciary must exhibit a high degree of solvency; (5) *Capacity to account*: the fiduciary must demonstrate its experience and ability in handling the interests of several individuals; (6) *Fitness to handle the funds.* *Id.*

[121] *See* Overbeck, *Persons Upon Whom Duties and Obligations Are Imposed Under the Employee Retirement Income Security Act of 1974*, 51 TAXES 881, 882 (1974). *See also* Rock, *Fiduciary Responsibility Broadened by Provisions of the Pension Reform Act*, 3 TAX. FOR LAW. 262 (1975); Sporn, *Working with the New Rules of Fiduciary Responsibility in the 1974 Pension Reform Act*, 41 J. TAX. 263 (1974).

[122] 29 U.S.C. § 1104(a)(1)(B) (Supp. V 1975). *See generally* Herbert, *Investment Regulation and Conflicts of Interest in Employer-Managed Pension Plans*, 17 B.C. INDUS. & COM. L. REV. 127 (1976); Note, *Fiduciary Standards and the Prudent Man Rule under the Employee Retirement Income Security Act of 1974*, 88 HARV. L. REV. 960 (1975).

[123] Overbeck, *supra* note 121, at 888-90.

[124] 29 U.S.C. § 1131 (Supp. V. 1975).

[125] I.R.C. § 4975(a), (f)(1). As further protection, every fiduciary is required to be bonded in an amount equal to at least 10% of the plan assets, but not less than $1000 nor more than $500,000. 29 U.S.C. § 1112 (Supp. V 1975).

[126] I.R.C. §§ 6057, 6058. The previous disclosure requirements under the Welfare and Pension Plans Disclosure Act, 29 U.S.C. §§ 301-309 (1959) (repealed 1974), were repealed by ERISA.

[127] One author has compiled a list of five reports or notices to the Secretary of Labor, two reports to plan participants, three reports to the Treasury Department, four reports to requesting participants or beneficiaries, and two reports to the Pension Benefit Guaranty Corporation (federally funded insurance agency for plan benefits). Overbeck, *supra* note 121, at 884-87. A comprehensive list of the reports required through the plan's life is provided in M. CANAN, *supra* note 7, at 450-58.

[128] Overbeck, *supra* note 121, at 886. Another author commented, "If a picture has been painted that indicates file cabinets of pages, boxes or punched cards, and reels of magnetic tape, it's because that's what we're really going to have . . . ." Silverman, *Plan Administration and Record Keeping under ERISA*, 1 PENSION & PROFIT-SHARING TAX J. 143 (1975).

tailored to the individual's specific exigencies.[129] For those willing to surrender some degree of flexibility and control, standardized plans are available from numerous sources, of which the most common in Mississippi are commercial banks.[130]

IV. Evaluating a Keogh Plan

Selecting the most suitable Keogh plan is a two step process: (1) Does the individual need a plan?; and (2) If so, which plan is best for him? Since the answers depend exclusively on each individual's current and projected financial situation, they resist generalization. However, the same questions are applicable to virtually all situations.[131]

What will a plan do for the participant? Essentially, a Keogh plan allows the participant to switch from a taxed investment to a tax-sheltered investment with the expectation of earning greater income.[132] Larger accumulated income and larger initial investments resulting from the tax savings[133] should combine with lower tax brackets at retirement to provide more available capital. A close scrutiny of anticipated retirement earnings and the nature of current investments is mandatory to determine that the rate bracket will be lower and that the tax savings of the plan will be greater than the present situation.

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[129] The Internal Revenue Service has four prepared plans which may be used as examples in drafting a personal plan. The plans are entitled: (1) Prototype Defined Contribution Plan (Code C, 13 pages) (a plan which allows any qualified entity to be the administrator); (2) Master Defined Contribution Plan (Code D, 20 pages) (only the adopter may be the administrator); (3) Retirement Plan for Self-Employed Individuals and Their Employees (Code G, 35 pages); and (4) Retirement Plan for the Self-Employed (Code H, 63 pages). Copies of any of the plans may be obtained at a cost of $.10 per page by writing the Internal Revenue Service, Attn: Disclosure Officer, 301 North Lamar Street, Jackson, Mississippi 39202.

[130] Members of the American Bar Association or the Mississippi State Bar should also consider the American Bar Retirement Association Retirement Plan (ABRA). The ABRA plan is available on a nationwide scale to members of qualified bar associations and is administered by the Equitable Life Assurance Society. Joining the ABRA plan by creating a personal account in the existing plan or transferring an existing plan may be accomplished by completing two forms (three if an existing plan is being transferred) according to enclosed instructions. There are options similar to those under local plans available under the ABRA plan at a competitive fee. Information on the plan may be obtained by calling, toll free: 1-800-223-5790, or writing: ABRA Retirement Plan, Box 2457 G.P.O., New York, N.Y. 10001.

[131] A similar question format was used in the excellent monograph, J. Carter, What Every Lawyer Should Know About Self-Employed Retirement Plans 24-34 (1968).

[132] *Id.* at 27.

[133] Assuming an individual has a fixed amount budgeted for investment, there will be more cash available if no tax is paid on the invested capital than if a portion of the investment cash must be used to pay taxes on the money.

What will it cost? The cost of a plan is the most individualistic determination. The factors contributing to its resolution are listed in a sample worksheet in Appendix I.

In addition to each individual's costs, the trustees of standardized plans charge a fee for their services. As a part of a survey of Mississippi area banks, a comparison of fee schedules was made.[134] The annual base fee ranges from .5% to .7% of the market value of a plan's assets, but each bank has a minimum fee within the range of $100 to $500. If employee accounts are maintained as part of the plan, an additional $3 to $10 per account is charged each year. Implementation of the plan, payment of benefits, use of insurance contracts as investments and termination all involve additional charges.[135] It must be emphasized that each bank considers its fee schedule flexible and will allow some fee negotiation with the individual employer.

Can the individual afford it? The result reached in specific dollar amounts is usually the most persuasive indicator but can be misleading by itself. A potential participant must also decide whether he can contribute 15% of his income each year until he is sixty while retaining enough cash to meet living expenses and whether he can afford to forego use of the money for fifteen or twenty years. Juxtaposed with these elements are the tax benefits of a plan.[136]

If as a result of his inquiry the potential participant decides in favor of adopting a plan, he must select one that is compatible with his needs. Although an obvious option is to draft a personal plan, there are several hidden pitfalls.[137] The alternative, of course, is to use a prepared plan.

Nine master defined contribution plans[138] used by banks throughout Mississippi and in Tennessee were surveyed for purposes of preparing an analytical comparison.[139] Of the plans submitted, one was a pension

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[134] Fee schedules are confidential for each bank and are subject to change as necessary, making citations to individual banks unfeasible. The fee schedules used may be obtained by writing the trust departments of the banks listed in note 139 *infra*.

[135] The trustee bank will also prepare some of the forms that must be filed each year at a cost that is negotiable with some banks and set at $75 to $100 per form by others. See note 127 *supra*.

[136] See section III. *A.* 1., *B.*, *C.* 1. *supra*.

[137] See section III. *supra*. By using qualified plans such as the IRS models, see note 129 *supra*, many of the more technical drafting problems may be eliminated.

[138] None of the banks solicited provided a master defined benefit plan. This particular plan became available to self-employed individuals on January 1, 1976. I.R.C. § 401(j). It is possible for larger contributions than allowed in a defined contribution plan to be made to a defined benefit plan, although the 15% up to $7,500 deduction limits will apparently remain the same. *Id.* §§ 401(j)(2), 404(e)(1).

[139] Deposit Guaranty National Bank, *Master Self-Employed Retirement Plan and Trust* (Jackson, Mississippi) [hereinafter cited as Deposit Guaranty]; First Mississippi National Bank, *Master Self-Employed Individuals Retirement Plan* (Hattiesburg, Missis-

plan,[140] two were profit-sharing plans[141] and the remainder contained elections that allowed pension or profit-sharing treatment.[142] All plans were written to include owner-employees who qualified to participate and filed a consent form.[143]

Participation standards were substantially similar in all the plans. Eight plans based participation on an election of minimum years of service required for eligibility.[144] By allowing an election of zero years of service, employers could include all employees from the moment of

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sippi) [hereinafter cited as First Mississippi]; First National Bank, *Master Retirement Plan and Trust for Self-Employed Individuals* (Jackson, Mississippi) [hereinafter cited as FNB(1)]; First National Bank, *Master Retirement Plan and Trust for Self-Employed Individuals* (Jackson, Mississippi) [hereinafter cited as FNB(2)]; First Tennessee Bank, *Retirement Plan and Trust for Self-Employed Individuals* (Memphis, Tennessee) [hereinafter cited as First Tennessee]; Hancock Bank, *Plan and Trust for Self-Employed Individuals and their Employees* (Gulfport, Mississippi) [hereinafter cited as Hancock (1)]; Hancock Bank, *The Retirement Plan for the Self-Employed* (Gulfport, Mississippi) [hereinafter cited as Hancock (2)]; National Bank of Commerce of Mississippi, *Master Retirement Plan and Trust for the Self-Employed* (Columbus, Mississippi) [hereinafter cited as Nat'l Bank of Commerce]; Union Planters Bank, *Master Prototype Self-Employed Retirement Plan* (Memphis, Tennessee) [hereinafter cited as Union Planters]. All of the retirement plans listed are on file with the *Mississippi Law Journal*. Copies may be obtained by writing the trust department of the particular bank.

[140] Nat'l Bank of Commerce, *supra* note 139, at 6. A defined contribution pension plan has specified contribution amounts. The National Bank of Commerce's plan had not been approved by the Internal Revenue Service as of August 1, 1977, although letters of application have been filed. Advance approval of a master plan is not required, but as a consequence of non-approval, each individual who adopts the master plan must have his individual plan approved if challenged by the IRS and cannot rely on the master plan's acceptability.

[141] First Tennessee, *supra* note 139, at 3 (Joinder Agreement); Union Planters, *supra* note 139, at III (1)(c). A profit-sharing plan makes contributions dependent on the year's profits. First Tennessee has an approved plan but Union Planters, which has submitted letters of application, had not received an answer from the IRS as of August 1, 1977.

[142] Deposit Guaranty, *supra* note 139, at 1 (Adoption Agreement); First Mississippi, *supra* note 139, at 4, 7; FNB (1), *supra* note 139, at 19; FNB (2), *supra* note 139, at 1 (Adoption Agreement); Hancock (1), *supra* note 139, at 2-3 (Joinder Agreement); Hancock (2), *supra* note 139, at 5-6. Deposit Guaranty, First Mississippi, FNB(1) and FNB(2) have been approved. Hancock Bank has filed for approval of both plans, but no response had been received on either as of August 1, 1977.

[143] Deposit Guaranty, *supra* note 139, at 2; First Mississippi, *supra* note 139, at 4; FNB(1), *supra* note 139, at 3; FNB(2), *supra* note 139, at 1; (Adoption Agreement); First Tennessee, *supra* note 139, at 9; Hancock (1), *supra* note 139, at 6; Hancock (2), *supra* note 139, at 4; Nat'l Bank of Commerce, *supra* note 139, at 6; Union Planters, *supra* note 139, at III (1). Consent by owner-employees is required by I.R.C. § 401(d)(4)(A).

[144] Deposit Guaranty, *supra* note 139, at 1 (Adoption Agreement); First Mississippi, *supra* note 139, at 4; FNB(1), *supra* note 139, at 19; FNB(2), *supra* note 139, at 1 (Adoption Agreement); First Tennessee, *supra* note 139, at 2 (Joinder Agreement); Hancock (1), *supra* note 139, at 6; Hancock (2), *supra* note 139, at 3; Union Planters, *supra* note 139, at II (2).

hiring. One plan permitted greater flexibility by allowing two additional options for specifying minimum service.[145]

Vesting provisions were somewhat surprising. As required of all qualified plans that include owner-employees, employees were awarded immediate, non-forfeitable rights in the benefits accruing from their voluntary contributions.[146] However, no such requirement is imposed by the Code on employer contributions if no owner-employees are included under the plan.[147] Instead of utilizing the statutory options, every plan calls for immediate 100% vesting in employer contributions as well as employee contributions.[148] Although such a provision might be justified by its elimination of burdensome recordkeeping, and is necessary when owner-employees are participating, some employers without included owner-employees might find another option more advantageous.

More disparity among the surveyed plans occurs in the areas of contribution and distribution restrictions. Six of the nine plans permit employees to make voluntary contributions at their discretion[149] while one has provisions with the same effect.[150] The remaining two plans allow the employer to elect whether employee contributions will be permitted in his joinder agreement.[151] Additionally, the majority protect owner-employees by guaranteeing the minimum deduction.[152]

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[145] National Bank of Commerce allows a selection of 0-3 years of service, one year of service, immediate participation after one hour of service, and 0-36 months of service. Nat'l Bank of Commerce, *supra* note 139, at 5. Minimum hours of service may be specified to limit accrual of plan benefits. *Id.* at 7.

[146] Deposit Guaranty, *supra* note 139, at 5; First Mississippi, *supra* note 139, at 7, 9; FNB(1), *supra* note 139, at 7; FNB(2), *supra* note 139, at 1 (Adoption Agreement); First Tennessee, *supra* note 139, at 11; Hancock (1), *supra* note 139, at 12; Hancock (2), *supra* note 139, at 7-8; Nat'l Bank of Commerce, *supra* note 139, at 10. Union Planters' vesting provisions for employees are not discernible. This provision becomes important because employees may withdraw this amount at any time without penalty under all plans.

[147] See notes 80 & 81 and accompanying text *supra*.

[148] Deposit Guaranty, *supra* note 139, at 5; First Mississippi, *supra* note 139, at 7, 9; FNB(1), *supra* note 139, at 7; FNB(2), *supra* note 139, at 1 (Adoption Agreement); Hancock (1), *supra* note 139, at 12; Hancock (2), *supra* note 139, at 7-8; Nat'l Bank of Commerce, *supra* note 139, at 12. First Tennessee and Union Planters do not have discernible vesting provisions for employers. Similar withdrawal provisions for these benefits are not available.

[149] Deposit Guaranty, *supra* note 139, at 4; First Mississippi, *supra* note 139, at 6; FNB(1), *supra* note 139, at 6; FNB(2), *supra* note 139, at 1 (Adoption Agreement); Hancock (1), *supra* note 139, at 9; Nat'l Bank of Commerce, *supra* note 139, at 9.

[150] Hancock (2) allows the participant to elect annually whether he will make a contribution. Since voluntary contributions require a choice by the participant each year, this provision has the same effect as the clauses in note 149 *supra*. Hancock (2) *supra* note 139, at 6.

[151] First Tennessee, *supra* note 139, at 3 (Joinder Agreement); Union Planters, *supra* note 139, at IV (1).

[152] First Tennessee does not provide for the minimum deduction.

The type of benefit distribution is usually elected by the employer in the joinder agreement, but a few models accord participants that right.[153] The benefits from which they may choose are entirely dependent on the plan. Lump sum distributions are allowed by every plan.[154] Periodic distributions over a specified term of years are also used, but not as frequently as payments measured by the participant's life expectancy.[155] Finally, annuities, insurance and United States Retirement Bonds are available in a few plans.[156]

Only one prepared plan incorporated the single statutory provision authorizing a reduction in contributions without a corresponding decrease in the deduction. Integration[157] of contributions with social security taxes paid by the employer is a useful method of minimizing yearly out-of-pocket costs for those plans with no owner-employees, while still making the maximum contribution. Since this method is

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[153] *Election by employer*: Deposit Guaranty, *supra* note 139, at 8; FNB(1), *supra* note 139, at 12; FNB(2), *supra* note 139, at 1 (Adoption Agreement); First Tennessee, *supra* note 139, at 5, 26-30 (Joinder Agreement). *Election by participant*: Hancock (1), *supra* note 139, at 22 (time of election is uncertain); Hancock (2), *supra* note 139, at 12 (elect 30 days before benefits are scheduled to begin); Nat'l Bank of Commerce, *supra* note 139, at 13 (elect on or before the last day of the plan year preceding the year in which benefits will begin); Union Planters, *supra* note 139, at VII (3)(c) (time of election is uncertain). First Mississippi's plan is unclear concerning who makes the election and when it must be made.

[154] Deposit Guaranty, *supra* note 139, at 9; First Mississippi, *supra* note 139, at 12 (Joinder Agreement); FNB(1), *supra* note 139, at 12; FNB(2), *supra* note 139, at 1 (Adoption Agreement); First Tennessee, *supra* note 139, at 26-30; Hancock (1), *supra* note 139, at 20-22; Hancock (2), *supra* note 139, at 12; Nat'l Bank of Commerce, *supra* note 139, at 13; Union Planters, *supra* note 139, at VII (3).

[155] *Distribution over the lesser of 10 years or the participant's life expectancy*: Deposit Guaranty, *supra* note 139, at 9; First Mississippi, *supra* note 139, at 12-13. *Distribution over the lesser of 15 years or the participant's life expectancy*: FNB(1), *supra* note 139, at 12; FNB(2), *supra* note 139, at 1 (Adoption Agreement). *Periodic distribution over the life of the participant or the joint lives of the participant and spouse*: First Tennessee, *supra* note 139, at 26-30 (First Tennessee prefers this option and will automatically apply it unless another option is elected.); Hancock (1), *supra* note 139, at 20-22; Hancock (2), *supra* note 139, at 12; Nat'l Bank of Commerce, *supra* note 139, at 13; Union Planters, *supra* note 139, at VII (3).

[156] *Annuity*: First Tennessee, *supra* note 139, at 26-30; Hancock (2), *supra* note 139, at 12; Union Planters, *supra* note 139, at VII (3). *Insurance proceeds*: Hancock (1), *supra* note 139, at 4 (Adoption Agreement); Nat'l Bank of Commerce, *supra* note 139, at 28. *United States Retirement Bonds* (issued by the Pension Benefit Guaranty Corporation); First Mississippi, *supra* note 139, at 12-13; First Tennessee, *supra* note 139, at 26-30; Union Planters, *supra* note 139, at VII (3).

[157] Integration allows an employer to reduce the cash outlay for pension contributions by offsetting the social security taxes paid for the employee against the plan contribution. This is subject to special amount restrictions and does not apply to owner-employees. I.R.C. § 401(d)(6).

available only in specific circumstances and entails additional record-keeping, the plan makes it an election for the employer.[158]

Plan administrators are frequently important to an employer because of the impact on business operations if he is required to serve as the administrator. Four plans have such a requirement,[159] and an equal number require the employer to personally discharge an administrator's duties or to appoint an agent in his place.[160] One plan permits the employer that election[161] but also mandates that he select an advisory committee which apparently functions as a surrogate board of directors.[162] When an employer is selecting his administrator, the liability for fiduciary misconduct should be prominent in his considerations, as well as the inordinate time required to comply with a plan's reporting requirements.[163]

The most individualized portion in any of the surveyed plans relates to investment media and control. Eight plans place investment management fully within the trustee's discretion[164] although several mitigate control somewhat by allowing the employer to elect his preferred investment forms.[165] Once that election is made, however, trustee powers tend to be very broad, with four plans including the right to borrow money

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[158] Union Planters, *supra* note 139, at XIII.

[159] First Mississippi, *supra* note 139, at 17; FNB(1), *supra* note 139, at 2; FNB(2), *supra* note 139, at 1 (Adoption Agreement); Hancock (2), *supra* note 139, at 16.

[160] Deposit Guaranty, *supra* note 139, at 11; First Tennessee, *supra* note 139, at 34-35; Hancock (1), *supra* note 139, at 25; Union Planters, *supra* note 139, at XVI (4).

[161] Nat'l Bank of Commerce, *supra* note 139, at 1.

[162] *Id.* at 18. The advisory committee's powers include adopting rules of procedure for governing the plan, enforcing the plan regulations, handling all questions concerning a beneficiary's claim and directing the trustee in making distributions. *Id.* at 18-19.

[163] See note 127 *supra*.

[164] Deposit Guaranty, *supra* note 139, at 10; First Mississippi, *supra* note 139, at 13; FNB(1), *supra* note 139, at 14; FNB(2), *supra* note 139, at 8, 14; First Tennessee, *supra* note 139, at 43; Hancock (1), *supra* note 139, at 25; Nat'l Bank of Commerce, *supra* note 139, at 21; Union Planters, *supra* note 139, at IX. Hancock (2) puts investment control in the employer, but allows very limited investments. Hancock (2), *supra* note 139, at 16. Hancock (1) also authorizes the advisory committee to appoint a separate investment manager to control the fund's investments. Hancock (1), *supra* note 139, at 19. No other plan incorporates such an option.

[165] First Mississippi, *supra* note 139, at 15 (employer may require separate trusts from the bank's general investment accounts); FNB(1), *supra* note 139, at 14 (employer gives written investment instructions to the trustee); FNB(2), *supra* note 139, at 8 (employer may elect to invest in life insurance); First Tennessee, *supra* note 139, at 43-45 (unless otherwise instructed, the bank will invest in a joint and survivor annuity); Hancock (1), *supra* note 139, at 4 (Joinder Agreement) (employer can select certificates of deposit, securities and the mix in the general investment funds); Hancock (2), *supra* note 139, at 2 (Custodial Agreement) (unless otherwise instructed, a regular savings account will be used); Union Planters, *supra* note 139, at IX (unless otherwise instructed, the bank's investment funds will be used).

with the fund assets as collateral.[166]

Investment options are as varied as the plans. In an effort to minimize costs, two plans restrict investments to the trustee bank's savings accounts and time deposits.[167] Others are considerably more varied, allowing choices from other banks' accounts and certificates of deposit, life insurance, the option market, and the trustee bank's equity and fixed income investment funds.[168] In this area, an employer who can afford to spend the time has the potential for substantially improving his plan's performance.

Once a plan has been established, all models permit alteration of some provisions. The overwhelming majority allow the employer to amend any of the elections made in his joinder agreement, although one requires the trustee's consent,[169] and another permits the employer to amend both the joinder agreement and the master plan.[170] The other plans reserve the right of plan amendment to the trustee with differing notice requirements.[171] Amendment rights become important since the

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[166] Deposit Guaranty, *supra* note 139, at 10; FNB(2), *supra* note 139, at 14; First Tennessee, *supra* note 139, at 43-45; Nat'l Bank of Commerce, *supra* note 139, at 21.

[167] FNB(1), *supra* note 139, at 14; Hancock (2), *supra* note 139, at 1 (Custodial agreement).

[168] *Savings accounts of the trustee bank*: Deposit Guaranty, *supra* note 139, at 10; First Mississippi, *supra* note 139, at 2 (Trust Agreement); FNB(1), *supra* note 139, at 14; FNB(2), *supra* note 139, at 14; First Tennessee, *supra* note 139, at 43-45; Hancock (1), *supra* note 139, at 4 (Joinder Agreement); Hancock (2), *supra* note 139, at 1 (Custodial Agreement); Nat'l Bank of Commerce, *supra* note 139, at 21; Union Planters, *supra* note 139, at IX. *Savings accounts of other banks*: Hancock (1), *supra* note 139, at 4 (Joinder Agreement); Nat'l Bank of Commerce, *supra* note 139, at 21; Union Planters, *supra* note 139, at IX. *Bank investment funds*: Deposit Guaranty, *supra* note 139, at 10; First Mississippi, *supra* note 139, at 2 (Trust Agreement); FNB(2) *supra* note 139, at 14; First Tennessee, *supra* note 139, at 43-45; Hancock (1), *supra* note 139, at 4 (Joinder Agreement); Nat'l Bank of Commerce, *supra* note 139, at 25 (preferred investment); Union Planters, *supra* note 139, at IX. *Life insurance*: FNB(2), *supra* note 139, at 8; First Tennessee, *supra* note 139, at 3 (Joinder Agreement); Hancock (1), *supra* note 139, at 4 (Joinder Agreement); Nat'l Bank of Commerce, *supra* note 139, at 28; Union Planters, *supra* note 139, at IX. *Options*: First Tennessee, *supra* note 139, at 43-45; Union Planters, *supra* note 139, at IX.

[169] Deposit Guaranty, *supra* note 139, at 12; First Mississippi, *supra* note 139, at 16 (trustee must consent to the amendment); FNB(1) *supra* note 139, at 16; FNB(2), *supra* note 139, at 8; First Tennessee, *supra* note 139, at 52; Hancock (1), *supra* note 139, at 38; Hancock (2), *supra* note 139, at 18; Union Planters, *supra* note 139, at X.

[170] Nat'l Bank of Commerce, *supra* note 139, at 32.

[171] *Notice not required*: Deposit Guaranty, *supra* note 139, at 12; FNB(1), *supra* note 139, at 16; FNB(2), *supra* note 139 at 8; Hancock (2), *supra* note 139, at 2 (Adoption Agreement); Nat'l Bank of Commerce, *supra* note 139, at 32; Union Planters, *supra* note 139 at X. *Notice required*: First Mississippi, *supra* note 139, at 16; First Tennessee, *supra* note 139, at 52; Hancock (1), *supra* note 139, at 38-39 (30 days notice required unless the amendment's sole purpose is to keep the plan qualified under I.R.C. §§ 401-415).

plan must be re-evaluated as the business changes, using the same inquiries made in the initial decision adjusted by experience and the need to conform to any changed criteria.[172]

V. Conclusion

"Tax advantages for most professional persons are quite limited; they should be seized upon quickly and not be permitted to slip away."[173] Unfortunately, this is still the best argument that can be made for a Keogh plan. Despite its original lofty goals, current law has only partially spanned the gulf between professionals and corporate employees. Until parity rather than appeasement is the legislative impetus, the problems of discrimination and complex, overlapping regulations will persist.[174]

The future, however, does look brighter. With the passage of ERISA, the government has signaled a rekindling of its interest in private pension plans, and it seems likely that as the Social Security system becomes increasingly unwieldy, retirement planning will integrate public and private systems more thoroughly.[175] The emphasis will focus on certain levels of employee benefits constructed by employers on the government's foundation.[176] Although numerous problems will remain, the responsibilities for retirement support will be properly ordered.

Indications of the growing importance of private pensions abound. Pensions are increasingly becoming a part of compensation plans and employment conditions.[177] Plans for small businesses which focus on ease of operation and minimal expense are being developed. The Mississippi plans surveyed previously are excellent examples. Accordingly, "[a]n HR10 plan may be established with a minimum of difficulty and a minimum of expense if the lawyer or law firm will take the time to think the matter through."[178] With the growing abundance of master plans and increasingly simplified models to use in personally prepared plans, such statements are indicative of the future of Keogh plans in Mississippi.

T. David Cowart

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[172] A procedure for evaluating existing plans is suggested in Langer, *An Eight-Point Check List for Evaluating a Retirement Plan*, 6 Prac. Accountant 59 (July-August 1973).

[173] *H.R.10 Plans for Lawyers*, 40 Clev. B.J. 273, 275 (1969).

[174] Note, *supra* note 15, at 369.

[175] Wood, *ERISA—The Tip of An Iceberg in a Sea of Changes in Employee Benefits*, 2 Pension & Profit-Sharing Tax J. 184, 186-87 (1976).

[176] *Id.* at 189-90. The other alternatives suggested by the author would place an increasingly large burden on the government as retirement plans decline. See *id.* at 188-89.

[177] Siegfried, *supra* note 9, at 19.

[178] *H.R.10 Plans for Lawyers*, *supra* note 173, at 275.

APPENDIX

Keogh Plan Cost and Accumulation Worksheet[1]

I. Information needed from the client

Annual profits from his business (average) ..... (A)

Annual combined payroll of all employees (if any)[2] ..... (B)

Years remaining until anticipated retirement[3] ..... (C)

II. Necessary assumptions[4]

Annual expected return on invested funds ..... (D)

Marginal tax rate based on the client's filing status ..... (E)

III. Immediate annual cost of a Keogh plan

Client's deductible contribution on his behalf [15% of (A), not exceeding $7,500] ..... (F)

Plus: Client's nondeductible voluntary contribution on his behalf [10% of (A), not exceeding $2,500] ..... (G) _____

Client's total contribution on his behalf .....

Plus: Client's contribution for his employees [15% of (B)] ..... (H) _____

Total client contribution ..... (I)

Less: Amount saved because of no tax liability on contributions [(E) times (H)] ..... (J) _____

Client's annual cost to maintain a Keogh plan ..... (K) _____

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[1]For a similar SEITRA worksheet, see *Worksheet method for evaluating advantages and disadvantages of adopting an HR10 plan*, 4 TAX. FOR ACCT. 154 (1969).

[2]Only employees that work at least an average of 20 hours a week for 50 weeks a year must be included.

[3]Distributions must begin before the client reaches seventy and one-half years of age.

[4]Even though the last portion of the worksheet is a long-term projection, these assumptions are treated as being constant. The fact that both assumptions will vary over extended periods of time should be considered when the plan is re-evaluated.

	With Keogh Plan	Without Keogh Plan
IV. Funds available at retirement after taxes		
Accumulated funds at retirement [Compounded at (D) for (C) years] (L)		(M)
Plus: Portion of accumulated funds not taxable at retirement [(C) years times (G)] (N)		
[(C) years times (K)]	_____	(O)_____
Portion of accumulated funds that is taxable at retirement [(L) minus (N)] (P)		
[(M) minus (O)]	_____	(Q)_____
Tax on funds accumulated with Keogh plan[5] [(P) minus $10,000[6]] (R)		
[(R) times 10%] (S)		
Tax on (S) using single person rates (T)		
[(T) times 10] (U)	_____	
Tax on funds accumulated without a Keogh plan [(Q) times (E)]		(V)_____
Total after-tax funds available to the client at retirement [(P) plus (U)] (W)	_____	
[(Q) plus (V)]		(X)_____

If (W) exceeds (X), the Keogh plan would be monetarily advantageous under the present assumptions.

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[5]A lump-sum distribution from the Keogh plan is assumed to be comparable with the tax on the funds accumulated without a plan. The tax is computed using the 10 year forward-averaging provisions applicable to these distributions. If a client chooses a periodic distribution instead and has a life expectancy exceeding ten years, the tax could be lower.

[6]If (P) is less than $20,000, substitute 50% times (P) for $10,000.

THE FREEDOM OF INFORMATION ACT: A SURVEY OF LITIGATION UNDER THE EXEMPTIONS

In 1966, after a decade of study,[1] Congress passed the Freedom of Information Act[2] in the belief that "an informed electorate is vital to the proper operation of a democracy."[3] An open system of government information was comtemplated,[4] restricted only by the nine exemptions to the Act.[5] Indeed, Congress intended that the exemptions should provide clear statutory language and thus preclude subjective determinations by agencies and courts.[6] Unfortunately, the poor drafting that pervades the statute[7] and the conflicts inherent in the subject matter[8] have made the exemptions a fertile source of litigation. This Comment will survey the most important exemptions[9] and the litigation they have spawned, its purpose being more tutorial than analytical.

I. Background

The Freedom of Information Act (FOIA)[10] was created in response

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[1] H.R. Rep. No. 89-1497, 89th Cong., 2d Sess. 3-4, *reprinted in* [1966] U.S. Code Cong. & Ad. News 2418, 2422 [hereinafter cited as 1966 H.R. Rep.].

[2] Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250 (codified at 5 U.S.C. § 552 (1970)).

[3] S. Rep. No. 89-813, 89th Cong., 1st Sess. 3 (1965) [hereinafter cited as 1965 S. Rep.].

[4] 1966 H.R. Rep., *supra* note 1, at 1; 1965 S. Rep., *supra* note 3, at 3; U.S. Dep't of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act III (1967) [hereinafter cited as Attorney General's Memorandum].

[5] 5 U.S.C. § 552(b) (1970), *as amended, id.* (Supp. V 1975), *as amended further by* Pub. L. No. 94-409, § 5(b)(3), 90 Stat. 1241 (1976).

[6] "It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information policies." 1965 S. Rep., *supra* note 3, at 3.

> It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.

1966 H.R. Rep., *supra* note 1, at 6.

[7] See notes 28 through 30 and accompanying text *infra*.

[8] *E.g.*, Giannella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations*, 23 Ad. L. Rev. 217, 224 (1971); Koch, *The Freedom of Information Act: Suggestions for Making Information Available to the Public*, 32 Md. L. Rev. 189, 202-04 (1972). *See generally* Engel, *Introduction: Information Disclosure Policies and Practices of Federal Administrative Agencies*, 68 Nw. U.L. Rev. 184 (1973); Nader, *Freedom From Information: The Act and the Agencies*, 5 Harv. C.R.-C.L. L. Rev. 1 (1970).

[9] Due to both the lack of litigation under (b)(8) and (b)(9) and their uncontroversial nature, discussion of these exemptions is omitted. For a general discussion of these exemptions, see Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1101-04 (1975).

[10] 5 U.S.C. § 552 (1970), *as amended, id.* (Supp. V 1975), *as amended further by* Pub.

to section 3 of the Administrative Procedure Act of 1946 (APA)[11] and its failure to provide effective public access to government information.[12] Although designed to promote the people's right to know while protecting the legitimate need for secrecy, its purposes were severely restricted by certain intrinsic deficiencies. First, the APA restricted the eligibility of those who might request information.[13] Second, an agency was permitted to withhold information without actual justification.[14] Finally, the APA failed to provide a judicial remedy for wrongful withholding of information.[15] In light of these deficiencies, the FOIA was intended to provide full disclosure, judicial enforcement and elimination of the vague language of its predecessor.[16]

Generally, the FOIA requires public disclosure of information concerning policies, rules, organization, methods of operation, staff manuals and final opinions.[17] Each agency[18] must publish rules for obtaining information in the *Federal Register* "for the guidance of the public."[19]

L. No. 94-409, § 5(b)(3), 90 Stat. 1241 (1976).

[11] Act of June 11, 1946, ch. 324, § 3, 60 Stat. 237 (current version at 5 U.S.C. § 552 (Supp. V 1975), *as amended by* Pub. L. No. 94-409, 90 Stat. 1241 (1976)).

[12] 1966 H.R. REP., *supra* note 1, at 5-6; 1965 S. REP., *supra* note 3, at 5; Project, *supra* note 9, at 1023.

[13] Under the APA, agencies were required to divulge information only to "persons properly and directly concerned." Act of June 11, 1946, ch. 324, § 3(c), 60 Stat. 238.

[14] Section 3 exempted governmental functions "requiring secrecy in the public interest," while section 3(b) exempted adjudicatory final opinions and orders "required for good cause to be held confidential." Act of June 11, 1946, ch. 324, §§ 3, 3(b), 60 Stat. 238. These exemptions were drafted such that agencies were allowed to substitute their own interests for that of the public.

> Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities and the withholding justified by such phrases as—"requiring secrecy in the public interest," or "required for good cause to be held confidential."

1965 S. REP., *supra* note 3, at 3. In fact, the vague language rendered it susceptible to use as authority for the withholding of information. *E.g.*, EPA v. Mink, 410 U.S. 73, 79 (1973); Moss, *Public Information Policies, the APA, and Executive Privilege*, 15 AD. L. REV. 111, 114-15 (1963); Note, *The Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150, 152 (1969); 80 HARV. L. REV. 909, 909 (1967).

[15] 1966 H. R. REP. *supra* note 1, at 2; 1965 S. REP., *supra* note 3, at 5, 8. See Bennett, *The Freedom of Information Act, Is It a Clear Public Records Law?*, 34 BROOKLYN L. REV. 72, 73 (1967); Project, *supra* note 9, at 1023; Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895, 899 (1974).

[16] 1965 S. REP., *supra* note 3, at 3.

[17] 5 U.S.C. § 552(a) (1970), *as amended, id.* (Supp. V 1975).

[18] The definition of "agency" can be found at 5 U.S.C. § 551(1) (1970). *See also* Project, *supra* note 9, at 1026-30.

[19] 5 U.S.C. § 552(a)(1) (1970), *as amended, id.* (Supp. V 1975). Also required to be published are statements of policy, rules of procedure, organizational structure, methods of operation, and each alteration affecting the material to be published. *Id.* For commen-

Additionally, the Act permits "any person" to demand government information,[20] thus relaxing the APA requirement that the person be "properly and directly concerned."[21] Perhaps the most important aspect of the new Act, however, is the section providing district court de novo review[22] of agency denials to disclose information. The court rather than the information's custodian will decide if disclosure would be inimical to the public interest,[23] and the agency will have the burden of either producing the requested information or showing cause for its withholding.[24]

Although the FOIA provided for disclosure of a broad spectrum of information, Congress also recognized the need to protect information whose disclosure would be adverse to the public interest.[25] Nine exemptions[26] were included in the Act, each of which permits, but does not require, nondisclosure.[27] The exemptions encompass a substantial body

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tary on what arguably does not have to be published, see Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 773 (1967).

[20] 5 U.S.C. § 552(a)(3) (1970), *as amended, id.* (Supp. V 1975).

[21] See note 13 *supra*. It has been suggested that the "any person" language used by the FOIA raises "a presumption of disclosure." *E.g.*, Note, *supra* note 15, at 919; Note, *Freedom of Information: The Statute and the Regulations*, 56 GEO. L.J. 18, 52 (1967).

[22] 5 U.S.C. § 552 (a)(3) (1970) (current version at *id.* (Supp. V 1975)), provided in pertinent part:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action.

[23] 1966 H. R. REP., *supra* note 1, at 9; 1965 S. REP., *supra* note 3, at 8; Note, *supra* note 14, at 152-53 & n.21. For further discussion of the House and Senate versions, see Note, *supra* note 14, at 153-55.

[24] 5 U.S.C. § 552 (a)(3) (1970), *as amended, id.* (Supp. V 1975); *see* 1965 S. REP., *supra* note 3, at 8; Note, *supra* note 15, at 898; Note, *supra* note 14, at 152-53; 49 TUL. L. REV. 678, 679 (1975).

[25] "At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain . . . information in Government files . . . ." 1965 S. REP., *supra* note 3, at 3.

[26] 5 U.S.C. § 552(b) (1970), *as amended, id.* (Supp. V 1975), *as amended further by* Pub. L. No. 94-409, § 5(b)(3), 90 Stat. 1241 (1976). The exemptions are: (1) national defense and foreign policy secrets, section II. *A.*, *infra*; (2) personnel rules and practices, section II. *B.*, *infra*; (3) existing statutory exemptions, section II. *C.*, *infra*; (4) trade secrets and business information, section II. *D.*, *infra*; (5) governmental memoranda, section II. *E.*, *infra*.; (6) matters of personal privacy, section II. *F.*, *infra*; (7) investigatory files, section II. *G.*, *infra*; and finally, (8) financial institution reports and (9) information concerning wells, both of which are discussed generally at Project, *supra* note 9, at 1101-04.

[27] *E.g.*, Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1197 (4th Cir. 1976) (disclosure of exempt information within discretion of agency); Note, *supra* note 21, at

of information with the potential for defeating the purposes of the Act if construed too broadly.[28] When combined with numerous drafting inadequacies,[29] this latitude has encouraged agency resistance to disclosure[30] and a concomitant increase in litigation.

II. Litigation Under the Exemptions

A. *National Defense and Foreign Policy Secrets*

The first exemption, section (b)(1), originally applied to matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."[31] Since these secrets were already protected from disclosure by the quasi-constitutional[32] concept of executive privilege,[33] judicial interpretation has resulted in a diminu-

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28. *See generally* Drachsler, *The Freedom of Information Act and the "Right" of Non-Disclosure*, 28 Ad. L. Rev. 1 (1976).

[28] *See* Note, *supra* note 21, at 28 (exemptions designed to provide court with standards to review refusals to disclose; success of Act will depend upon narrowness of those standards).

[29] *See* Epstein v. Resor, 421 F.2d 930, 932 (9th Cir.) ("unquestionably the Act is awkwardly drawn"), *cert. denied*, 398 U.S. 965 (1970); Davis, *supra* note 19, at 807 (Act described as a shabby product); Kramer and Weinberg, *The Freedom of Information Act*, 63 Geo. L.J. 49, 52-53 (1974) (FOIA hardly represents apogee of legislative draftsmanship); Note, *The Freedom of Information Act—The Parameters of the Exemptions*, 62 Geo. L.J. 177, 177 (1973) (courts have had to assume responsibility for defining the meaning and application of the exemptions because of awkward draftsmanship); Note, *supra* note 14, at 163 (one cause of Act's failure can be traced to the vagueness of the language).

[30] For example, the Act directs agencies to respond "promptly" to requests for information. 5 U.S.C. § 552(a)(3) (1970), *as amended*, *id.* (Supp. V 1975). In reality the average delay from initial request to initial response is 33 days. House Subcommittee on Foreign Operations and Government Information, Administration of the Freedom of Information Act 2 (1973), H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. (1972), *cited in* Note, *supra* note 15, at 927 n.167. The average delay for appeals from preliminary or intermediate denials of disclosure is 50 days. *Id.* This has necessitated a substantial financial or personal interest to motivate a challenge to wrongfully withheld information. Note, *supra* note 14, at 157 & n.60. For further insight into the delay and avoidance tactics of agencies, see Koch, *supra* note 8, at 202-04; Kramer & Weinberg, *supra* note 29, at 53-54; Nader, *supra* note 8, at 5-13; Note, Vaughn v. Rosen: *Procedure and Proof Under the Freedom of Information Act*, 35 U. Pitt. L. Rev. 850, 854 (1974).

[31] 5 U.S.C. § 552 (b)(1) (1970) (current version at *id.* (Supp. V 1975), *as amended by* Pub. L. No. 94-409, § 5(b)(3), 90 Stat. 1241 (1976).

[32] *E.g.*, Note, United States v. Nixon *and the Freedom of Information Act: New Impetus for Agency Disclosure?*, 24 Emory L.J. 405, 406-10 (1975).

[33] *See generally* Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 Yale L.J. 477 (1957); Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383 (1974); Hardin, *Executive Privilege in the Federal Courts*, 71 Yale L.J. 879 (1962); Symposium, United States v. Nixon: *An Historical Perspective*, 9 Loy. L.A.L. Rev. 11 (1975). National defense and foreign policy fall under the state secrets privilege. Zagel, *The State*

tion of the exemptions's effectiveness regardless of how narrowly the courts have interpreted it.[34]

Epstein v. Resor,[35] the first case to consider the exemption, tested judicial authority to review an agency denial of access to documents concerning a post-World War II program known as "Operation Keelhaul." Arguing that the Army's "Top Secret" classification[36] of the documents was unjustified, the plaintiff urged the district court to inspect the papers in camera and determine the appropriate classification for itself.[37] The court refused, stating that forcing justification of a classification would be tantamount to treating all information withheld by an agency identically, regardless of whether it fell within an exemption.[38] The court of appeals affirmed,[39] but limited the decision to (b)(1). Since (b)(1) is the only exemption which entails a secrecy classification as "required by Executive order," the "judicial inquiry is limited to the question whether an appropriate executive order has been made."[40] Ac-

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Secret Privilege, 50 MINN. L. REV. 875, 875-76 (1966). Other privileges under this concept include those for official information, see note 128 *infra*, and for informants.

[34] *See, e.g.*, Soucie v. David, 448 F.2d 1067, 1080-83 (D.C. Cir. 1971) (Wilkey, J., concurring) (Congress cannot compel statutory disclosure of information constitutionally protected).

[35] 296 F. Supp. 214 (N.D. Cal. 1969), *aff'd*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970).

[36] Classifying documents to prevent disclosure began when President Roosevelt issued an executive order protecting certain military information from disclosure during World War II. Exec. Order No. 8381, 3 C.F.R. 634 (1938-1943 Compilation). This order was extended by President Truman to include all information related to national security. Exec. Order No. 10,290, 3 C.F.R. 789 (1949-1953 Compilation). President Eisenhower reacted to criticism of the classification system and reduced the number of agencies authorized to classify information. Exec. Order No. 10,501, 3 C.F.R. 979 (1949-1953 Compilation). President Kennedy further restricted the system by providing for an automatic declassification-downgrading system. Exec. Order No. 10,964, 3 C.F.R. 486 (1959-1963 Compilation). President Nixon, also reacting to public criticism, reduced the amount of information which could be classified, provided for early declassification, and established a review committee to oversee the implementation of the order. Exec. Order No. 11,652, 3 C.F.R. 339 (1974). Note, *National Security and the Public's Right to Know: A New Role for the Courts Under the Freedom of Information Act*, 123 U. PA. L. REV. 1438, 1442-43 (1975). *See also* Murphy, *Knowledge Is Power: Foreign Policy and Information Interchange Among Congress, the Executive Branch, and the Public*, 49 TUL. L. REV. 505, 511-38 (1975); Note, *Declassification of Sensitive Information: A Comment on Executive Order 11652*, 41 GEO. WASH. L. REV. 1052 (1973); Note, *National Security and the Amended Freedom of Information Act*, 85 YALE L. J. 401, 407-08 (1976).

[37] 296 F. Supp. at 216.

[38] *Id.* at 217. This logic would have the effect of voiding 5 U.S.C. § 552(a)(4) (Supp. V 1975), which grants district courts jurisdiction to review de novo agency decisions to withhold information. Note, *National Security and the Public's Right to Know: A New Role for the Courts Under the Freedom of Information Act*, *supra* note 36, at 1444.

[39] 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970).

[40] 421 F.2d at 933.

cordingly, review of the material or its classification was unwarranted.[41]

The propriety of viewing the information itself to determine inclusion under (b)(1) was first considered by the Supreme Court in *EPA v. Mink*,[42] a suit to compel production of documents pertaining to a planned nuclear test. Environmental and national defense documents pertinent to the test were classified "Secret" or "Top Secret" pursuant to Executive Order 10,501.[43] In reversing the circuit's order to conduct an in camera inspection,[44] the Court held that the FOIA did not authorize or permit in camera inspections of contested documents under (b)(1).[45] Indeed, (b)(1) was interpreted as prohibiting judicial review of *any* document classified in a procedurally appropriate manner by an executive agency.[46] In effect, *Mink* made the release of classified information improbable and "in essence returned the ball to Congress."[47]

Congress acted swiftly to discredit *Mink*[48] by including in its 1974

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[41] *Id.; accord,* Wolfe v. Froehlke, 358 F. Supp. 1318, 1320 (D.D.C. 1973) (second attempt to force disclosure of "Operation Keelhaul" files rejected on foreign policy grounds), *aff'd*, 510 F.2d 654 (D.C. Cir. 1974).

A possible exception to this reasoning is Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), where two citizens sought disclosure of an evaluation of a federal program for development of a supersonic transport aircraft. The district court had dismissed the suit, relying on the doctrine of executive privilege. *Id.* at 1071 (the district court opinion was not published). The court of appeals reversed and remanded, reasoning that since the government had not expressly invoked the privilege, the issue was not properly before the court and therefore should not be decided because of its "serious constitutional questions." *Id.* at 1071-72 & n.8, *citing* United States v. Reynolds, 345 U.S. 1, 7-8 (1953) (doctrine of executive privilege "belongs to the Government and must be asserted by it"). Additionally, in language contrary to *Epstein*, the court indicated that if the government asserted a specific privilege on remand, an in camera inspection might be necessary. 448 F.2d at 1080. The significance of this assertion, however, may have been limited by a subsequent statement that the government could avoid such an inspection by sufficiently describing relevant portions of the information so as to justify nondisclosure. *Id.* For further discussion of *Soucie*, see Kramer & Weinberg, *supra* note 29, at 49-59, 53-54, 59-61, 63; Note, *supra* note 32, at 412; 49 TUL. L. REV. 678, 682 (1975).

[42] 410 U.S. 73 (1973).

[43] See note 36 *supra*.

[44] 464 F.2d 742, 746 (D.C. Cir. 1971).

[45] 410 U.S. at 84. The Court indicated that in camera inspections were appropriate for exemptions other than (b)(1). *Id.* at 93. *See generally* Note, *In Camera Inspections Under the Freedom of Information Act*, 41 U. CHI. L. REV. 557, 557 (1974).

[46] *Id.* at 83-84. Thus, under exemption (b)(1), a determination that the document was properly classified under Executive Order No. 10,501 would foreclose further judicial review. *Id.* at 84.

[47] 42 U. CIN. L. REV. 529, 538 (1973). *See also* Mink, *The Mink Case: Restoring the Freedom of Information Act*, 2 PEPPERDINE L. REV. 8, 8 (1974); Note, 123 U. PA. L. REV., *supra* note 36, at 1445-49; Note, *The First Amendment and the Public Right to Information*, 35 U. PITT. L. REV. 93, 108-14 (1975); 42 U. CIN. L. REV. 529, 529 (1973).

[48] H.R. CONF. REP. No. 93-1380 and S. CONF. REP. No. 43-1200, 93d Cong., 2d Sess.

amendments to the Act[49] a provision which revises (b)(1) to permit withholding of only those materials which are

> (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order.[50]

Through this amendment and another permitting in camera review of documents withheld under any of the exemptions,[51] Congress attempted to restrict agency control over (b)(1) exemption information.[52]

The first case decided under the new amendment was *Alfred A. Knopf, Inc. v. Colby*,[53] in which a former CIA agent contested an injunction restraining disclosure of information that allegedly had not been classified.[54] In reversing the district court, the Fourth Circuit held that the amended (b)(1) requirements[55] were satisfied if the information "is classifiable and is shown to have been embodied in a classified document."[56] This classification standard allows exemption whenever the

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12, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6285, 6287 [hereinafter cited jointly as CONF. REP.].

[49] Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (1974).

[50] Act of Nov. 21, 1974, Pub. L. No. 93-502, § 2(a), 88 Stat. 1561 (1974) (codified at 5 U.S.C. § 552 (b)(1) (Supp. V 1975), *as amended by* Pub. L. No. 94-409, § 5(b)(3), 90 Stat. 1241 (1976)). The applicable Executive Order is No. 11,652, 3 C.F.R. 339, 347 (1974). See note 36 *supra*.

[51] Act of Nov. 21, 1974, Pub. L. No. 93-502, § 1(b)(2), 88 Stat. 1561 (1974) (codified at 5 U.S.C. § 552(a)(4) (Supp. V 1975)).

[52] Note, *The Freedom of Information Act Amendments of 1974: An Analysis*, 26 SYRACUSE L. REV. 951, 967 (1975). Unlike the original exemption which was interpreted to require only proper procedural classification, see note 46 and accompanying text *supra*, the Conference Report on the amendments contemplated both a procedural and a substantive review of the classifications. CONF. REP., *supra* note 48, at 11-12; Note, *Judicial Review of Classified Documents: Amendments to the Freedom of Information Act*, 12 HARV. J. LEGIS. 413, 431-45 (1975); 49 TUL. L. REV. 678, 682-84 (1975). For discussion of the constitutional challenge to the amendments, see Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741, 754-55 (1975); Project, *supra* note 9, at 1049-50.

[53] 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975). *Colby* was the sequel to United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972), in which a former CIA employee had been enjoined from publicly disclosing classified information he obtained during his employment.

[54] 509 F.2d at 1369.

[55] Although the case was decided 12 days before the amendments became operative, the court nevertheless felt compelled to apply the amended section. *Id.* at 1367.

[56] *Id.* at 1369. The court found that some of the items related to intelligence operations and were clearly classifiable under Executive Order No. 11,652, see note 36 *supra*, and that other items "may relate" to intelligence operations. 509 F.2d at 1368. The case was remanded to the district court "for reconsideration and fresh findings imposing a

information sought is merely properly classified and disregards its relation to national defense or security. Thus, the *Colby* court interpreted the amended exemption in virtually the same manner as the Supreme Court had construed the original exemption in *Mink*.[57] If this interpretation is in fact the one which will be placed on the amended (b)(1) exemption,[58] Congress must again attempt to make the national security

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burden of proof consistent with this opinion and including the additional element of classifiability." *Id.* at 1370.

[57] See note 46 and accompanying text *supra*. The court also directed the plaintiffs to the Interagency Classification Review Committee, see note 36 *supra*, for consideration of information thought to be properly declassifiable, stating that the "administrative remedy . . . is far more effective than any the judiciary may provide." 509 F.2d at 1370. Thus, the court refused to accept the responsibility placed on it by the amended exemption to determine if the documents were properly classified both procedurally and substantively in accordance with the appropriate executive order. *See* CONF. REP., *supra* note 48, at 12 (amendment's intent was to override *Mink* and to allow both procedural and substantive in camera review); Note, *National Security and the Public's Right to Know: A New Role for the Courts Under the Freedom of Information Act*, *supra* note 36, at 1450 (intent was to encourage the courts to examine both the procedural and substantive criteria of a classification); Note, *National Security and the Amended Freedom of Information Act*, *supra* note 36, at 419 (The *Colby* "opinion defers the substantive question of the declassification . . . to the Interagency Declassification Review Committee," thus sidestepping the issue.).

[58] Indeed, the trend appears to deny in camera inspection and rely instead on affidavits, a practice which makes the success of the exemption depend on the honesty of the agencies. *E.g.*, Klaus v. Blake, 428 F. Supp. 37, 38-39 (D.D.C. 1976) (court would rely on sufficient affidavit and not require in camera review); Marks v. CIA, 426 F. Supp. 708, 709-10 (D.D.C. 1976) (affidavit reference to certain information sufficient without in camera review); Bennett v. United States Dep't of Defense, 419 F. Supp. 663, 665-66 (S.D.N.Y. 1976) (although court may examine in camera the reasonableness of classification, it is not required in every case; here relied on affidavits).

Another case worthy of note is Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976), a suit for the disclosure of all records relating to CIA attempts to discourage media publication of information concerning a large "research" vessel. *Id.* at 1011-12. The CIA had refused the request, stating that it could neither confirm nor deny the existence of such records as their existence or nonexistence itself was a classified fact. *Id.* The plaintiff, under Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), moved to require detailed justification for each document claimed to be exempt. The district court denied the request and granted the government's motion for summary judgment on the basis of an in camera review of two classified affidavits. *Id.* at 1012. Although approving the in camera review of the affidavits without participation by plaintiff's counsel, the court of appeals agreed with the plaintiff's contention that the agency should be required to support its position on the basis of the public record. *Id.* at 1012-14; *see* Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973) (mere conclusory affidavit is insufficient; statute requires detailed justification with documents itemized and indexed to correlate justification for refusal with portion claimed to be exempt; court may appoint special master to examine documents and evaluate the claimed exemption); *accord*, Nixon v. Sirica, 487 F.2d 700, 720-21 (D.C. Cir. 1973). The *Phillippi* court ordered the agency to provide a public affidavit explaining in as much detail as possible the agency's claim for

exemption a workable section of the Act.[59]

B. Personnel Rules and Practices

The second exemption, section (b)(2), permits the withholding of information "relating solely to the internal personnel rules and practices of an agency."[60] Because of conflicting congressional reports on the Act,[61] the courts have differed in their interpretations of this section. The Senate took the statutory language verbatim, granting exemptions to rules and practices which affected all agency personnel.[62] The House, on the other hand, believed the exemption applied solely to agency operating rules and procedure manuals.[63] The Senate exemption thus applied only to routine employer-employee rules that the House would disclose, at the same time making information exempted by the House available to the public.[64] Although the House construction was adopted by the Attorney General[65] and a few courts,[66] the Senate interpretation has

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exemption and stated that only after this should the district court, if necessary, consider information which cannot be made public. The court reversed the summary judgment and remanded the case, stating that the plaintiff may prove through appropriate discovery that the govrnment's position was untenable. *Id.* at 1013-14.

Phillippi is significant in that it indicates that in camera inspection of the documents will be required. "It is clear that the FOIA contemplates that the courts will resolve fundamental issues in contested cases on the basis of in camera examination of the relevant documents." *Id.* at 1012-13. It remains to be seen whether the courts will require as much when the documents themselves can be produced.

[59] It has been suggested that to make the classification system work in harmony with the FOIA, Congress should more narrowly define the substantive classification areas and only permit classification of foreign policy or national defense objectives requiring protection from disclosure. Note, *National Security and the Amended Freedom of Information Act*, *supra* note 36, at 421-22. *But see* note 34 *supra*. For an excellent discussion of the amended (b)(1) exemption and the problems it presents, see Note, *National Security and the Amended Freedom of Information Act*, *supra* note 36. For additional commentary on the new (b)(1) exemption, see Clark, *supra* note 52, at 757-59; Mink, *supra* note 47, at 24-26; Project, *supra* note 9, at 1047-50; Note, *The Freedom of Information Act Amendments of 1974: An Analysis*, *supra* note 52, at 966-67; Note, *National Security and the Public's Right to Know: A New Rule for the Courts Under the Freedom of Information Act*, *supra* note 36, at 1453-57.

[60] 5 U.S.C. § 552(b)(2) (1970).

[61] *Compare* 1966 H.R. REP., *supra* note 1, at 10, *with* 1965 S. REP., *supra* note 3, at 8.

[62] "Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like." 1965 S. REP., *supra* note 3, at 8.

[63] 1966 H.R. REP., *supra* note 1, at 10.

[64] 1966 H.R. REP., *supra* note 1, at 10; 1965 S. REP., *supra* note 3, at 8. *See* Project, *supra* note 9, at 1051; Note, *supra* note 21, at 33 n.107; Note, *supra* note 14, at 154; 6 U. TOL. L. REV. 217, 227 & n.50 (1974).

[65] ATTORNEY GENERAL'S MEMORANDUM, *supra* note 4, at 31. The report contended that the Senate view would interfere with certain agencies' regulatory functions. *Id.* See Pro-

emerged as the majority[67] and better view.[68]

In *Department of the Air Force v. Rose*,[69] the Supreme Court resolved the conflict by relying on the Senate version.[70] The House construction was discarded as too broad since its primary focus was on preventing disclosures which could aid circumvention of agency regulation.[71] Therefore, where there is no risk of circumvention, exemption (b)(2) is not applicable to matters of "genuine and significant public interest."[72]

The standard provided in *Rose* contemplates broad disclosure in compliance with the purpose of the Act.[73] Yet, despite this intent, the door has been opened to a sustantial problem. The Court has stated very

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ject, *supra* note 9, at 1051-52; Note, *supra* note 29, at 183; Note, *supra* note 14, at 155-56; 6 U. TOL. L. REV. 217, 227 & n.51 (1974).

[66] *See, e.g.*, Polymers, Inc. v. NLRB, 414 F.2d 999, 1006 (2d Cir. 1969) (guide to conducting NLRB elections within House interpretation and therefore exempt), *cert. denied*, 396 U.S. 1010 (1970); Cuneo v. Laird, 338 F. Supp. 504, 506 (D.D.C. 1972) (contract audit manual within (b)(2) exemption), *remanded sub nom.*, Cuneo v. Schlesinger, 484 F.2d 1086, (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

[67] *See, e.g.*, Hawkes v. IRS, 467 F.2d 787, 797 (6th Cir. 1972) (adopting House construction would not be wise approach to statutory interpretation); Stokes v. Hodgson, 347 F. Supp. 1371, 1373 (N.D. Ga. 1972) (intra-agency housekeeping rules and practices are within language of exemption (b)(2)), *aff'd sub. nom.*, Stokes v. Brennan, 476 F.2d 699 (5th Cir. 1973). It has been noted, however, that the majority of the cases dealing with (b)(2) did not involve the type of information expressly exempted by the 1966 H.R. REP., see note 1 *supra*, or the ATTORNEY GENERAL'S MEMORANDUM, see note 4 *supra*. Project, *supra* note 9, at 1052. Since it was not changed in the 1974 amendments, Congress evidently felt no need to amend (b)(2).

[68] The operating procedures and substantive regulations of an agency are precisely the type of information which should have public disclosure. *See* Department of the Air Force v. Rose, 425 U.S. 352, 366-67 (1976), *citing* Vaughn v. Rosen, 523 F.2d 1136, 1142 (D.C. Cir. 1973) (FOIA requires choice of Senate version since it is most favorable to disclosure).

[69] 425 U.S. 352 (1976). See notes 158 through 165 and accompanying text *infra*. At issue was a request for case summaries of honor and ethics hearings maintained by the United States Air Force Academy. *Id.* at 355.

[70] *Id.* at 366-67.

[71] 425 U.S. at 366-67. The Court also noted that the 1965 S. REP., see note 3 *supra*, was the only report before both houses and consequently must be accepted as the sole expression of both the House and Senate intentions. *Id.* at 366.

[72] *Id.* at 369. The Court stated that the thrust of the exemption was to relieve agencies from assembling and maintaining for public inspection information which could not reasonably be expected to interest the public. *Id.* at 369-70. Mr. Justice Blackmun, however, argued that the information was exempt under (b)(2) since it related to "internal personnel . . . practices" of the agency. *Id.* at 386 (Blackmun, J., dissenting).

[73] *See, e.g.*, Note, *supra* note 15, at 956 (the only rules to be protected are those whose disclosure would little benefit the public and impair agency efficiency in preparation for release); Project, *supra* note 9 at 1054-55 (if (b)(2) is narrowly construed, its only use may be to prevent agency harassment by requests for insignificant information).

pointedly that significant public interest in a matter precludes it from being "related solely to the internal personnel rules and practices of an agency."[74] If carried to its logical extreme, this rationale could deny (b)(2) any meaningful effect. For example, the question of when the standard is met is overshadowed by the greater question of how public interest should be measured. Is the fact that an individual is concerned enough to request disclosure or bring suit sufficient to trigger the release of information?[75] Or, if public interest is gauged on an economic scale, is the public's multi-billion dollar investment in the federal government significant?[76] Public interest is an ambiguous standard which must be either legislated away or revised and more fully explained if the exemption is to achieve its intended vitality.[77]

C. *Existing Statutory Exemptions*

The third protection from general disclosure is for information already exempted by other statutes.[78] The original (b)(3) exemption dealt with matters "specifically exempted from disclosure by statute"[79] thus presenting the courts with the task of constructing a proper interpretation of "specifically."[80] The plaintiff in *Tax Analysts & Advocates v.*

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[74] 425 U.S. at 369. *But see* Cox v. Levi, 427 F. Supp. 833, 833 (W.D. Mo. 1977) (FBI rules and regulations manual held exempt under (b)(2) as relating "solely to the internal personnel rules and practices of an agency"; under public interest test, requested information would not have been exempt).

[75] *See* 6 U. TOL. L. REV. 215, 230 (1974). As an example of how little is required to meet the test, the *Rose* Court noted that innocuous "items such as newspaper excerpts, a press conference by an [agency] officer and a White House Press Release . . . illustrate the extent of general concern." 425 U.S. at 368-69.

[76] For instance, it was suggested in *Rose* that the information requested would be of public interest since the cadets' education was publicly financed. 425 U.S. at 369.

A second problem concerns privacy under (b)(2). The use of a public interest standard will occasionally, as it did in *Rose*, see notes 158 through 165 and accompanying text *infra*, involve questions of privacy. When this occurs, the privacy issue is treated under exemption (b)(6), see section II. *F. infra*. But where a "significant public interest" has already been acknowledged, any balancing of privacy against the public's right to know under (b)(6), see note 159 and accompanying text *infra*, might be a foregone conclusion.

[77] For further discussion of (b)(2) and related problems, see Project, *supra* note 9, at 1051-55; Note, *supra* note 14, at 153-156; Note, *supra* note 29, at 182-85; Note, *supra* note 21, at 31-33; Note, *supra* note 45, at 579-91; 6 U. TOL. L. REV. 215, 227-31 (1974).

[78] 5 U.S.C. § 552(b)(3) (Supp. V 1975), *as amended by* Pub. L. No. 94-409, § 5(b)(3), 90 Stat. 1241 (1976)).

[79] 5 U.S.C. § 552(b)(3) (1970) (current version at *id.* (Supp. V 1975), *as amended by* Pub. L. No. 94-409, § 5(b)(3), 90 Stat. 1241 (1976)).

[80] Several statutes raise the issue of whether information is "specifically" exempted. Among these are: (1) 18 U.S.C. § 1905 (1970) (criminal sanctions for federal employees who divulge information gained during the course of their employment), *construed in* National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 686-87 (D.C. Cir. 1976) (§

IRS[81] requested unpublished letter rulings and technical advice memoranda. The IRS refused, contending that two statutes[82] protecting the confidentiality of tax returns gave rise to a (b)(3) exemption.[83] The court held that technical advice memoranda refers to a tax return and is therefore "specifically" exempted.[84] Letter rulings, however, are voluntary requests for advice. Since they would not be used to determine tax due the government, letter rulings were not contemplated by either statute and therefore were not exempt under (b)(3).[85] It is interesting that the court apparently assumed the alternative exemptions met the (b)(3) requirement since the opinion was directed at the scope of the suggested statutes and not at their specificity.[86] Later cases construing

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1905 has general applicability and is not specific); Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1203 (4th Cir. 1976) (§ 1905 qualifies for inclusion under (b)(3)); General Dynamics Corp. v. Dunlop, 427 F. Supp. 578, 581-82 (E.D. Mo. 1976) (same); Tax Reform Research Group v. IRS, 419 F. Supp. 415, 418 (D.D.C. 1976) (§ 1905 merely prescribes penalties for disclosure of confidential information); Chamberlain v. Alexander, 419 F. Supp. 235, 239 (S.D. Ala. 1976) (argument that § 1905 is within § 552(b)(3) well taken); (2) 42 U.S.C. § 2000e-8(e) (derived from § 709(e) of the Civil Rights Act of 1964, imposes penalties for disclosure of confidential trade and financial information by federal employees), *construed in* Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1199 (4th Cir. 1976) (information involved cannot claim immunity under § 2000e-8(e) as a statute within (b)(3)); (3) 50 U.S.C. §§ 403(d)(3), (g) (1970) (making the CIA director responsible for protecting intelligence sources and methods from unauthorized disclosure and exempting the agency from any other law requiring disclosure), *construed in* Phillippi v. CIA, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976) (§ 403(d)(3) could be within (b)(3); § 403g is a "limited" exemption which only implements § 403(d)(3)); Baker v. CIA, 425 F. Supp. 633, 635 (D.D.C. 1977) (court found § 403g to be within (b)(3) in light of *Phillippi*); Marks v. CIA, 426 F. Supp. 708, 710-11 (D.D.C. 1976) (both § 403g and § 403(d)(3) are statutes within the meaning of (b)(3)); Bennett v. United States Dep't of Defense, 419 F. Supp. 663, 667 (S.D.N.Y. 1976) (same). Another possible exemption prohibits the Secretary of HEW from disclosing information obtained in the course of his duties except as prescribed by regulation. 42 U.S.C. § 1306 (Supp. III 1972); *see* California v. Weinberger, 505 F.2d 767, 768 (9th Cir. 1974) (§ 1306 is a (b)(3) exemption statute since it is an absolute ban on disclosure of agency documents); Stretch v. Weinberger, 495 F.2d 639, 640 (3d Cir. 1974) (§ 1306 is not within (b)(3) as it lacks appropriate specificity). For discussion of these and other cases concerning specificity, see Project, *supra* note 9, at 1056-60; Note, *The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act*, 76 COLUM. L. REV. 1029, 1033-36 (1976); Note, *supra* note 29, at 185-86.

[81] 505 F.2d 350 (D.C. Cir. 1974).

[82] The two statutes were I.R.C. § 6103(a)(1), providing for inspection of tax returns only by order of the President or by rule promulgated by the Secretary and approved by the President, and I.R.C. § 7213(a)(1), which makes the unauthorized disclosure of income tax return information unlawful.

[83] 505 F.2d at 353.

[84] *Id.* at 355.

[85] *Id.* at 354. The court also stated that the mere fact that the ruling was attached to the tax return did not make it a part of the return. *Id.*

[86] *Id.* at 354-55; *cf.* Freuhauf Corp. v. IRS, 522 F.2d 284, 289-90 (6th Cir. 1975) (court concerned with relationship of information to tax return, not specificity of statute), *cert.*

the original (b)(3) exemption generally distinguished statutes which prohibit disclosure of specifically defined information from those which prohibit disclosure on a general basis.[87]

This approach was disclaimed by the Supreme Court in *FAA v. Robertson*.[88] Robertson had requested reports compiled by the FAA concerning the compliance of commercial air carriers with federal safety standards.[89] The FAA's refusal to produce the reports was based on section 1104 of the Federal Aviation Act of 1958,[90] which provides for nondisclosure when release of the information would adversely affect interested parties. The Supreme Court, relying on an incomplete reading of an ambiguous legislative history,[91] held that section 1104 was an exempting statute under (b)(3) and, since Congress had not intended to repeal nondisclosure statutes,[92] was compatible with the FOIA. Furthermore, the Court implied that the "specific-nonspecific" distinction used by the lower courts was incorrect[93] since discretionary withholding statutes fall within the ambit of specificity as used in (b)(3). In short, *Robertson* presented Congress with a tremendous expansion of the exemption. The lawmakers acted quickly to remedy the situation by amending (b)(3).[94]

The amended exemption allows nondisclosure provided that the

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granted, 423 U.S. 1047 (1976). For critical analyses of the decision in *Tax Analysts*, see Project, *supra* note 9, at 1057-58; Note, *supra* note 80, at 1034-35; 9 GA. L. REV. 499, 499 (1975); 29 U. MIAMI L. REV. 610, 610 (1975); 8 U. MICH. J.L. REF. 329, 334-36 (1975).

[87] Project, *supra* note 9, at 1959; Note, *supra* note 80, at 1036; *see, e.g.*, Schechter v. Weinberger, 506 F.2d 1275, 1277 (D.C. Cir. 1974) (read as a whole, the statute under consideration was not a specific exemption); California v. Weinberger, 505 F.2d 767, 768 (9th Cir. 1974) (statute is specific if exemption is stated rather than implied); Stretch v. Weinberger, 495 F.2d 639, 640 (3d Cir. 1974) (statute provided no basis for agency decisions and, consequently, was not specific); M.A. Shapiro & Co. v. SEC, 339 F. Supp. 467, 470 (D.D.C. 1972) (to fall within (b)(3), a statute must "restrict public access to specific government records").

[88] 422 U.S. 255 (1975).

[89] The requested report was entitled SYSTEMS WORTHINESS ANALYSIS PROGRAM REPORTS (SWAP). *Id.* at 257. See FEDERAL AVIATION ADMINISTRATION, SWAP HANDBOOK, FAA Order 8000-3C, *cited in* 422 U.S. at 257 n.3.

[90] 49 U.S.C. § 1504 (1970).

[91] *See* Note, *supra* note 80, at 1038-40.

[92] 422 U.S. at 266.

[93] *Id.* at 265. The Court stated that to require specificity of nondisclosure statutes would in effect be a congressional reassessment of all previously granted authority to withhold information. *Id.* It was suggested that a statute was "specific" if it in fact was authority for the withholding of information. *Id. See also* Project, *supra* note 9, at 1060-61; Note, *supra* note 80, at 1040; 49 TEMP. L.Q. 238, 240 (1975).

[94] H.R. REP. No. 94-1441, 94th Cong., 2d Sess. 14 (1976). For further discussion of the *Robertson* case, see Project, *supra* note 9, at 1059-61; 49 TEMP. L.Q. 238, 238 (1975).

exempting statute other than section 552(b)

> (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.[95]

Thus, three categories of specificity were established into which a statute must fall to qualify as an exemption.[96] Again, the problem is definitional. While most courts will have no trouble with "discretion,"[97] the term "particular" is decidedly obscure since the text of the amendment was redrafted in conference.[98] Although it is too early to determine a trend, it is apparent that the courts remain confused as to the status of certain statutes.[99] Without definitive guidance by the Supreme Court or Congress, the courts will be left to their own devices in interpreting the new exemption.[100]

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[95] Government in the Sunshine Act, Pub. L. No. 94-409, § 5(b)(3), 90 Stat. 1241 (1976) (amending 5 U.S.C. § 552(b)(3) (Supp. V 1975)).

[96] *See* Note, *supra* note 80, at 1043. The (b)(3)(A) requirement that the alternative exemption allow no discretion presents an interesting dichotomy in light of the fact that exemption (b)(3) itself is discretionary. See note 27 and accompanying text *supra*.

[97] *But cf.* Note, *supra* note 80, at 1046 (qualifications in alternative statutes which otherwise require mandatory nondisclosure may render the exemption discretionary).

[98] Note, *supra* note 80, at 1042. Thus, the intent behind the amendment must be ascertained from either the conference report, H.R. REP. No. 94-1441, 94th Cong., 2d Sess. 8, 14, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2245, or the congressional debates, 122 CONG. REC. H9258 (daily ed. Aug. 31, 1976), 122 CONG. REC. S15043 (daily ed. Aug. 31, 1976). See Note, *supra* note 80, at 1042.

[99] *Compare* Phillippi v. CIA, 546 F.2d 1009, 1018 (D.C. Cir. 1976) (MacKinnon, J., dissenting) (although not yet in effect, amendment will strengthen CIA exemption as § 1905 leaves no discretion on the issue) *with* Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150, 158 n.15 (D.D.C. 1976) (dictum) (committee reports indicate that § 1905 is not within exemption) *and* Crown Cent. Petroleum Corp. v. Kleppe, 424 F. Supp. 744, 752-53 (D. Md. 1976) (same). Both *Metropolitan Life* and *Crown Central* relied on H.R. REP. No. 94-880, 94th Cong., 2d Sess. pt. 1, 23 (1976). If the debates are accurate indicators of congressional intent, see note 98 *supra*, the statements in *Metropolitan Life* and *Crown Central* are based on dubious authority.

Another case mentioning the amendment, National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976), held § 1905 to be a non-exempting statute without reference to any express intent to exclude § 1905 from the exemption. Although the amendment was not yet in effect, there is no indication that the court's rationale would have been different if it were. *Id.* at 687; *see* Crown Cent. Petroleum Corp. v. Kleppe, 424 F. Supp. 744, 753 (D. Md. 1976) (though not yet in effect, amendment's expression of congressional intent must be accepted at time of decision).

[100] One suggestion is that the courts balance the purpose of the FOIA with the need for secrecy expressed by a particular statute in determining whether statutes which do not clearly fit within the amendment should nevertheless yield exemptions. If not, the court must then determine whether the statute is incompatible with the purpose of the FOIA and should be considered as repealed by Congress. See Note, *supra* note 80, at 1043. For discussion of the pre-amendment (b)(3) exemption and the Federal Privacy Act, 5 U.S.C.

D. Trade Secrets and Business Information

The fourth exemption to the FOIA includes "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[101] The provision is subject to several different grammatical constructions giving rise to various conclusions as to which information is included. For example, the provision can be read as protecting either three categories of information—trade secrets, commercial or financial information, and privileged or confidential information—or two classes of material—trade secrets and commercial or financial information which is privileged or confidential.[102] Indeed, the courts have read the provision both ways.[103]

Beyond grammar, the scope of several words used in (b)(4) has caused substantial conflict. Although several definitions of "trade secret" are available,[104] and commentators vary on which is favored,[105] the

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§ 552a (Supp. IV 1974), see Note, *An Introduction to the Federal Privacy Act of 1974 and Its Effect on the Freedom of Information Act*, 11 NEW ENG. L. REV. 463, 487-93 (1976).

[101] 5 U.S.C. § 552(b)(4) (1970). Exemption (b)(4) has been said to be "the most unfathomable provision of the Act." Koch, *supra* note 8, at 215; *see, e.g.*, Davis, *supra* note 19, at 787-89; Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEX. L. REV. 1261, 1263 (1970); Wallace, *Proper Disclosure and Indecent Exposure; Protection of Trade Secrets and Confidential Commercial Information Supplied to the Government*, 34 FED. B.J. 295, 296 (1975); Note, *Would Macy's Tell Gimbel's: Government Controlled Business Information and the Freedom of Information Act, Forwards and Backwards*, 6 LOY. U.L.J. 594, 598 (1975); 17 B.C. INDUS. & COM. L. REV. 91, 94 (1975); 88 HARV. L. REV. 470, 472-73 (1974).

[102] Davis, *supra* note 19, at 787-89; *see, e.g.*, Katz, *supra* note 101, at 1263; Wallace, *supra* note 101, at 296; Note, *supra* note 101, at 598.

[103] *Compare* Brockway v. Department of the Air Force, 518 F.2d 1184, 1188 (8th Cir. 1975) (two classes of information are exempt) *with* Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591, 594 (D.P.R. 1967) (confidential information is exempt without regard to commercial or financial character). Interestingly, the 1967 ATTORNEY GENERAL'S MEMORANDUM, *supra* note 4, at 32, listed four different meanings for the language in (b)(4).

[104] *See, e.g.*, O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 BUS. LAW. 1125, 1125-26 (1975) ("trade secrets" may be construed broadly or narrowly, but most courts have followed the RESTATEMENT OF TORTS § 757, comment b (1939)); Comment, *A Review of the Fourth Exemption of the Freedom of Information Act*, 9 AKRON L. REV. 673, 678-79 (1976) (a "trade secret" is not in the public domain; matters readily and completely disclosed by the product itself do not qualify); Note, *Public Disclosure of Confidential Business Information Under the Freedom of Information Act*, 60 CORNELL L. REV. 109, 112-13 (1974), *quoting* United States *ex rel.* Norwegian Nitrogen Prods. Co. v. United States Tariff Comm'n, 6 F.2d 491, 495 (D.C. Cir. 1925), *rev'd on other grounds*, 274 U.S. 106 (1927) ("an unpatented, secret, commercially valuable plan, appliance, formula or process, which is used for the making, preparing, compounding, treating or processing of articles or materials which are trade commodities"); Note, *supra* note 101, at 598-600 (most popular definition is RESTATEMENT OF TORTS § 757, comment b (1939), but several variations and limitations exist).

[105] Two definitions of trade secrets are most often cited by authorities as the ones approved by the courts.

courts have had no problem in interpreting the term.[106] Similarly, the meaning of "privileged" has presented few problems.[107] "Confidential," however, has been a source of repeated litigation.[108] Initially, a subjective interpretation was employed to define confidential as private information which customarily would not be released by the person from whom it was obtained.[109] Although this definition was derived from lan-

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> A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

RESTATEMENT OF TORTS § 757, comment b (1939). *See* O'Reilly, *supra* note 104, at 1126; Comment, *supra* note 104, at 678; Note, *supra* note 101, at 599 n.34.

A second definition is found in United States *ex rel.* Norwegian Nitrogen Prods. Co. v. United States Tariff Comm'n, 6 F.2d 491, 495 (D.C. Cir. 1925), *rev'd on other grounds*, 274 U.S. 106 (1927).

> The term "trade secrets" as ordinarily understood, means an unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used for the making, preparing, compounding, treating or processing of articles or materials which are trade commodities.

See Project, *supra* note 9, at 1063 n.619; Note, *supra* note 104, at 112 n.20.

[106] *E.g.*, Project, *supra* note 9, at 1063; Note, *supra* note 104, at 112; Note, *supra* note 101, at 598. Confusion with the term belied by harmonious results may be explained by the fact that the trade secret exemption is seldom used. Furthermore, the courts are not inhibited by the narrow protection of trade secrets since the scope of the other (b)(4) categories is sufficiently broad to include most definitions. *See* O'Reilly, *supra* note 104, at 1125-26. For discussion of trade secrets, see Gellhorn, *Business Secrets in Administrative Agency Adjudications*, 22 AD. L. REV. 515, 515 (1970); Martin & Springgate, *Protection of a Businessman's Proprietary Information*, 32 LA. L. REV. 497, 497 (1972); Note, *Trade Secrets Protection of Non-Technical Competitive Information*, 54 IOWA L. REV. 1164, 1164 (1969).

[107] This is probably because "privileged" is used in the FOIA as coextensive with traditional common law privileges. *See* 1966 H.R. REP., *supra* note 1, at 10; 1965 S. REP., *supra* note 3, at 9; Project, *supra* note 9, at 1064; Note, *supra* note 104, at 112-13; Note, *supra* note 21, at 35. Additionally, if the information is questionably privileged, it is probably covered by the "confidentiality" exemption. *See* Project, *supra* note 9, at 1065.

[108] *Compare, e.g.*, Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591, 594 (D.P.R. 1967) (exempting statements "given in confidence") *with* National Parks & Conservation Ass'n v. Morton, 351 F. Supp. 404, 406-07 (D.D.C. 1972) (exempting statements that would not usually be revealed to the public by the source of the information), *rev'd*, 498 F.2d 765 (D.C. Cir. 1974). *See, e.g.*, Wallace, *supra* note 101, at 296; Project, *supra* note 9, at 1065 ("[T]he meaning of the term 'confidential' has been extensively litigated."); Note, *supra* note 104, at 112-13 (scope of "confidential" material should be construed "as narrowly as is consistent with" the purpose of the exemption); Note, *Developments Under the Freedom of Information Act—1974*, 1975 DUKE L.J. 416, 441 ("Currently, the most troublesome problem for the courts is to determine when concededly commercial financial information obtained from a person is 'confidential' within the meaning of the exemption."); 88 HARV. L. REV. 470, 472-73 (1974) ("[T]he recurrent problem of defining 'confidential' has proven troublesome.").

[109] *See, e.g.*, Fisher v. Renegotiation Bd., 473 F.2d 109, 113 & n.4 (D.C. Cir. 1972) (information confidential if not otherwise publicly disclosed); Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971) (information which communicant did not want released

guage in the Senate and House reports on the Act,[110] using the communicant's subjective view as the indicator of confidentiality broadened the exemption beyond congressional intent.[111]

National Parks and Conservation Association v. Morton[112] established a new test for confidentiality based on the purpose of the exemption rather than congressional reports.[113] The suit was filed to compel disclosure of agency records concerning concession operations of the National Park Service.[114] After reviewing the legislative history,[115] the court determined that the purpose of (b)(4) was to protect suppliers of information as well as the agency receiving it.[116] Accordingly, the court set forth a standard to protect information which, if disclosed, would be likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."[117]

The *National Parks* standard was a significant improvement over previous criteria in that it provided an objective test focusing on the information itself.[118] Notably, the first alternative prohibits the withholding of information obtained by a compulsory procedure since no

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held confidential); Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578, 582 (D.C. Cir. 1970) (exemption contemplates information not ordinarily disclosed); Benson v. GSA, 289 F. Supp. 590, 594 (W.D. Wash. 1968) (exemption applies to information supplier wishes to keep confidential), *aff'd*, 415 F.2d 878 (9th Cir. 1969); Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591, 594 (D.P.R. 1967) (information given in confidence need not be disclosed).

[110] *E.g.*, Davis, *supra* note 19, at 787-92; Katz, *supra* note 101, at 1268; Project, *supra* note 9, at 1065-66; O'Reilly, *supra* note 104, at 1130-31; Wallace, *supra* note 101, at 296; Note, *supra* note 104, at 114-16. *See generally* 1966 H.R. REP., *supra* note 1, at 10; 1965 S. REP., *supra* note 3, at 9.

[111] *See, e.g.*, Project, *supra* note 9, at 1065; Note, *supra* note 15, at 950; Note, *supra* note 104, at 116; Note, *supra* note 21, at 36-37. This construction is also contrary to that in Soucie v. David, 448 F.2d 1067, 1078 (D.C. Cir. 1971) (exemptions are to be narrowly construed).

[112] 498 F.2d 765 (D.C. Cir. 1974).

[113] *Id.* at 767.

[114] *Id.* at 766; *see* National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976) (appeal after remand). See note 120 *infra*.

[115] 498 F.2d at 766-70.

[116] *Id.* at 770.

[117] *Id.* at 770 (citation omitted).

[118] *See. e.g.*, General Dynamics Corp. v. Dunlop, 427 F. Supp. 578, 582 (E.D. Mo. 1976) (disclosure of information in affirmative action plan would cause substantial harm to competitive position of plaintiff); Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150, 159-66 (D.D.C. 1976) (evaluation of consequences of disclosure of various information to determine confidentiality); Sonderegger v. United States Dep't of Interior, 424 F. Supp. 847, 852-53 (D. Idaho 1976) (disclosure of information would harm competitive position of its supplier); Save the Dolphins v. United States Dep't of Commerce, 404 F. Supp. 407, 411 (N.D. Cal. 1975) (test for determining confidentiality is objective).

impairment of the government's ability to obtain further information can result.[119] The second exemption alternative, however, requires a likelihood of "substantial harm to the competitive position" of the information's supplier and provides fertile ground for complex and protracted litigation. Faced with this prospect, those who might otherwise seek such information might be discouraged from doing so.[120] Despite this weakness,[121] the *National Parks* test appears to be a significant step toward fulfilling the FOIA's purpose of providing for the fullest possible disclosure.[122]

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[119] *See, e.g.*, 498 F.2d 765, 770 (since supplier required to provide information, there is presumably no danger to government ability to obtain information in disclosure); Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150, 166 (D.D.C. 1976) (threat of compliance actions will ensure acquisition of sought information); Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 776-77 (D.D.C. 1974) (disclosure of information mandatorily furnished to Customs Service would not impair ability to obtain); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292, 296 (C.D. Cal. 1974) (mandatory affirmative action plans). For problems with the test's first alternative, see Project, *supra* note 9, at 1067; Note, *supra* note 108, at 443-44; Note, *supra* note 101, at 603-04; 88 HARV. L. REV. 470, 476-77 (1974).

[120] The *National Parks* case itself is an excellent example of the problems associated with the test. On appeal after remand, the court found that the (b)(4) exemption applied to five of the seven concessioners and remanded further with respect to the other two for consideration of whether they faced "meaningful competition." 547 F.2d 673, 687 (D.C. Cir. 1976); *see, e.g.*, Project, *supra* note 9, at 1068; 88 HARV. L. REV. 470, 476 (1974).

[121] One problem is inherent in the exemption itself. Since agencies are charged with protecting the interests of both government and business, companies which have supplied information may be forced to sue the receiving agency when they are inadequately represented by it and face disclosure of damaging, private information as a result. In these "reverse-FOIA" actions, the courts are in disagreement as to whether the information may be disclosed even if it falls within the exemption. *See, e.g.*, Westinghouse Elec. Corp. v. United States Nuclear Regulatory Comm'n, 555 F.2d 82, 93-94 (3rd Cir. 1977) (Atomic Energy Act gives agency discretion to disclose matters exempted by FOIA); Marinette Marine Corp. v. United States, 546 F.2d 365, 366 (Ct. Cl. 1976) (express commitment by agency to keep information confidential makes a difference in the decision); Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1211 (4th Cir. 1976) (FOIA confers implied right to supplier of private information to enjoin disclosure if within exemption (b)(4)); Union Oil Co. v. FPC, 542 F.2d 1036, 1045 (9th Cir. 1976) (confidential information may not be released); Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150, 156 (D.D.C. 1976) (agency decision to disclose exempt information subject to reversal only for abuse of discretion); Sonderegger v. United States Dep't of Interior, 424 F. Supp. 847, 853 (D. Idaho 1976) (court bases no decision of nondisclosure on the promise of confidentiality). For discussion of reverse-FOIA cases, see Drachsler, *supra* note 27, at 1; Note, *supra* note 101, at 607; Note, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 NW. U.L. REV. 995, 995 (1976); 88 HARV. L. REV. 470, 476 & n.34 (1974).

[122] An indication of the utility of the test is the fact that the exemption was neither amended in 1974 nor subsequently. For additional critical analysis of exemption (b)(4), see Davis, *supra* note 19, at 787-92; Hulett, *Privacy and the Freedom of Information Act*, 27 AD. L. REV. 275, 279-81 (1975); Katz, *supra* note 101, at 1262-72; Project, *supra* note 9, at 1061-69; Note, *supra* note 104, at 673; Note, *supra* note 15, at 948-53; Note, *supra* note

E. Governmental Memoranda

The fifth exemption[123] has been said to be the most expansive[124] since its shields "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[125] Its purpose is two-fold: (1) to promote uninhibited discussion of opinions and policy, and (2) to prevent premature disclosure of agency information that could impede the administrative process.[126] To limit the conceivably all-inclusive exemption, discovery principles are applied "by way of rough analogies"[127] to (b)(5) exemption cases.[128]

In applying these discovery principles against the government, the courts have maintained a fact-policy distinction, permitting nondisclosure of advisory opinions while ordering disclosure of purely factual information.[129] Nevertheless, factual information will be protected when

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45, at 572-75; Note, *supra* note 108, at 441-44; Note, *supra* note 21, at 34-39; Note, *supra* note 101; 17 B.C. INDUS. & COM. L. REV. 91, 91 (1975); 88 HARV. L. REV. 470, 470 (1974).

[123] 5 U.S.C. § 552(b)(5) (1970).

[124] *See, e.g.*, Project, *supra* note 9, at 1069; Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 HARV. L. REV. 1047, 1048-49 (1973).

[125] 5 U.S.C. § 552(b)(5) (1970).

[126] 1966 H.R. REP., *supra* note 1, at 10; 1965 S. REP., *supra* note 3, at 9; *see, e.g.*, Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 107 (D.C. Cir. 1976); Aug v. National R.R. Passenger Corp., 425 F. Supp. 946, 951 (D.D.C. 1976); Tax Reform Research Group v. IRS, 419 F. Supp. 415, 422 (D.D.C. 1976); Katz, *supra* note 101, at 1272; Project, *supra* note 9, at 1069-70; Note, *supra* note 45, at 575; Note, *supra* note 29, at 189; Note, *supra* note 124, at 1049.

The attorney's work product is an additional area sought to be protected by (b)(5). 1965 S. REP., *supra* note 3, at 2. The privilege was announced in Hickman v. Taylor, 329 U.S. 495 (1947), and applied through (b)(5) to agency memoranda in, *e.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154 (1975); Kent Corp. v. NLRB, 530 F.2d 612, 618 (5th Cir. 1976); Pope v. United States, 424 F. Supp. 962, 964 (N.D. Ga. 1977).

[127] EPA v. Mink, 410 U.S. 73, 86 (1973).

[128] There is a distinct similarity of purpose between the governmental privilege defense against discovery and exemption (b)(5). *Compare* Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958) (governmental privilege encourages open and frank discussion between subordinate and chief concerning administrative action) *with* 1966 H.R. REP., *supra* note 1, at 10 (agency cannot operate effectively if required to disclose information prematurely; need for full and frank discussion acknowledged); *see, e.g.*, Katz, *supra* note 101, at 1272-73; Project, *supra* note 9, at 1071-72; Note, *supra* note 29, at 189-90; Note, *supra* note 21, at 40; 1976 B.Y.U.L. REV. 269, 270-71 (1976).

As with (b)(1), see notes 33 through 34 and accompanying text *supra*, (b)(5) coincides with an area of executive privilege—the official information privilege. *E.g.*, Zagel, *supra* note 33, at 875-76. For discussion of the common law privilege for official information, see Katz, *supra* note 101, at 1272-73. For comment on executive privilege and the (b)(5) exemption, see Note, *supra* note 32, at 413-24.

[129] *See, e.g.*, EPA v. Mink, 410 U.S. 73, 89-90 (1973) (exemption (b)(5) requires different treatment of deliberative or policymaking processes from that of investigative

it is "inextricably intertwined with policy-making process,"[130] and disclosure of severable factual material found in deliberative memoranda will be ordered.[131]

Another distinction has been drawn "between predecisional memoranda prepared in order to assist an agency decision-maker in arriving at his decision, which are exempt from disclosure, and postdecisional memoranda setting forth the reasons for an agency decision already made, which are not."[132] This distinction has created a conflict between exemption (b)(5) and the general FOIA requirement that final opinions

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matters); Schwartz v. IRS, 511 F.2d 1303, 1305 (D.C. Cir. 1975) (factual material may not be withheld under (b)(5)); Aug v. National R.R. Passenger Corp., 425 F. Supp. 946, 950 (D.D.C. 1976) ("recommendations, discussions, deliberations and policy alternatives leading to decisions" are protected from disclosure under (b)(5)); Furr's Cafeterias, Inc. v. NLRB, 416 F. Supp. 629, 631 (N.D. Tex. 1976) (documents containing analyses, opinions, and thought processes of the writers not subject to disclosure).

[130] Soucie v. David, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971); *accord*, Washington Research Project, Inc. v. HEW, 504 F.2d 238, 249 (D.C. Cir. 1974) (purely factual matter may be exempt if inextricable without compromise of the deliberative process), *cert. denied*, 421 U.S. 963 (1975); Tax Reform Research Group v. IRS, 419 F. Supp. 415, 422 (D.D.C. 1976) (entire document may be withheld when factual and deliberative material are inextricably intertwined); *cf.* Cooper v. Department of Navy, 558 F.2d 274, 278 (5th Cir. 1977) (aircraft accident safety investigation containing primarily factual material is nevertheless exempt as it can be expected to contain adverse statements obtained upon promise of confidentiality).

[131] *E.g.*, EPA v. Mink, 410 U.S. 73, 91 (1973) (exemption (b)(5) contemplates common sense approach of discovery that extends to severable factual material); Schwartz v. IRS, 511 F.2d 1303, 1305 (D.C. Cir. 1975) (purely factual material which is severable must be disclosed); Tax Reform Research Group v. IRS, 419 F. Supp. 415, 422 (D.D.C. 1976) (factual information segregable from otherwise deliberative memorandum must be disclosed). To determine if memoranda does indeed contain severable factual information, in camera inspection may be used in "appropriate" circumstances. EPA v. Mink, 410 U.S. 73, 92-94 (1973). Since in camera inspection impairs government confidentiality, *see* Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 947 (Ct. Cl. 1958), it has been held that an agency should have an opportunity outside in camera inspection to show that the information is clearly within the exemption. EPA v. Mink, 410 U.S. 73, 93 (1973); *see, e.g.*, Military Audit Project v. Bush, 418 F. Supp. 876, 878-79 (D.D.C. 1976) (government should be able to satisfy exemption in open court without revealing facts in exempt documents), *supplemented*, 418 F. Supp. 880 (1976); Morton-Norwich Prods., Inc. v. Mathews, 415 F. Supp. 78, 82-83 (D.D.C. 1976) ("profound mistake to transfer administrative responsibility to judges" on theory of dishonesty of person in employ of Executive branch); Note, *supra* note 45, at 575-79. Discretionary in camera inspections are allowed by 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975). For further discussion of the fact-policy distinction, see Project, *supra* note 9, at 1072-74; Note, *supra* note 45, at 576-78; Note, *supra* note 124, at 1049-57.

[132] Renegotiation Bd. v. Grumman Aircraft Eng'r Corp., 421 U.S. 168, 184 (1975); *see, e.g.*, Chamberlain v. Alexander, 419 F. Supp. 235, 239 (S.D. Ala. 1976) ("postdecision explanatory communications constitute final agency disposition and are not exempt under (b)(5)").

must be disclosed.[133] Initially, in *American Mail Line v. Gulick*,[134] an otherwise privileged memorandum lost its exempt status and became a final opinion when used as the sole basis for an agency decision.[135] The Supreme Court expanded the distinction in *NLRB v. Sears, Roebuck & Co.*,[136] where it applied the final opinion label to memoranda explaining why unfair labor practice charges were not filed. Since the failure to file precludes relief to the charging party, supporting documents were in effect final opinions.[137] Consistent with this reasoning, the Court held that records explaining why such complaints *were* filed and directing commencement of litigation would not present the requisite finality.[138]

The parameters of (b)(5) were again defined in *Renegotiation Board v. Grumman Aircraft Engineering Corp.*,[139] a suit for disclosure of documents compiled by an agency and its regional counterparts to determine whether certain government contractors had earned "excessive profits." After reviewing the agency's operating procedures,[140] the Supreme Court found that the regional decisions were not binding on the agency in reaching its final decision.[141] Thus, the Court concluded that such reports, *i.e.* those prepared by nondecision making bodies, were precisely what Congress intended to exempt under (b)(5).[142]

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[133] 5 U.S.C. § 552(a)(2)(A) (Supp. V 1975).

[134] 411 F.2d 696 (D.C. Cir. 1969).

[135] *Id.* at 703; *see* Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971) (characterization of memoranda which announce or explain decision held irrelevant). Cases after *Gulick* have also extended the "final opinion" rationale to statements of policy under § 552(a)(2)(B). *E.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153-54 (1975) (adoption of recommendation creates policy not exempt under (b)(5)); Ash Grove Cement Co. v. FTC, 511 F.2d 815, 818 & n.12 (D.C. Cir. 1975) (policy determinations are open to public scrutiny); Aug v. National R.R. Passenger Corp., 425 F. Supp. 946, 950-51 (D.D.C. 1976) (policy decision used as touchstone for future action must be disclosed).

[136] 421 U.S. 132 (1975).

[137] *Id.* at 148, 155.

[138] *Id. But see,* National Pub. Radio v. Bell, 431 F. Supp. 509, 512 n.7 (D.D.C. 1977) ("The determinative factor, of course, is that notwithstanding the nature of the decision ultimately reached, the withheld documents contain 'predecisional deliberative advice' properly exempted by the Act."). The *Sears* Court justified its decision preventing disclosure of the pre-litigation memoranda as protective of the administrative process. *Id.* at 151. The Court also held that exempt documents incorporated by reference into non-exempt material lose their exempt status. *Id.* at 161; *cf.* Aspin v. Department of Defense, 491 F.2d 24, 26 (D.C.Cir. 1973) (disclosure to authorized congressional committee does not waive exemption); Safeway Stores, Inc. v. FTC, 428 F. Supp. 346, 347 (D.D.C. 1977) (exemption not waived by disclosure to authorized congressional committee or by unauthorized leak).

[139] 421 U.S. 168 (1975).

[140] *Id.* at 171-79.

[141] *Id.* at 186-89. The Court found the same to be true of Division Reports prepared by several board members to assist the full board in making its decision. *Id.* at 189-90.

[142] *Id.* at 184-85. See 1976 B.Y.U.L. REV. 269, 269-70 (1976). The Court expressly

These cases reflect the refreshing uniformity achieved in construing (b)(5) through application of the fact-policy and predecisional-postdecisional criteria.[143] In dealing with this exemption, the courts have been influenced by both the need to protect the administrative decision-making process[144] and the inclination of the agency to give the exemption the broadest possible interpretation.[145] Clearly, this balancing process represents the judiciary's best attempt at unraveling Congress' twisted path into the bureaucracy.[146]

F. Matters of Personal Privacy

The sixth exemption protects information in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[147] Again, the loose language used by Congress has created problems in interpreting the scope of the exemption. The meaning of "similar files," for example, has been deciphered as information of a "highly personal nature"[148] and,

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declined to consider the effect on its decision of an agency's power to make "de facto decisions" subject to review. *Id.* at 185 n.22. *See also* Firestone Tire & Rubber Co. v. Coleman, 432 F. Supp. 1359, 1367 (N.D. Ohio 1976) (intra-agency advisory opinions which express nonfinal recommendations are exempt). Another area of agency information meriting comment concerns advisory memorandums obtained from outside sources assisting the agency. The Fifth Circuit, in Wu v. National Endowment for Humanities, 460 F.2d 1030, 1032 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973), held advisory memoranda submitted by outside consultants should not be disclosed in view of the chilling effect release would have upon the opinions of the consultants.

[143] See notes 129 through 133 and accompanying text *supra.*

[144] See, *e.g.*, note 138 and accompanying text *supra. See also* 1966 H.R. Rep., *supra* note 1, at 10; 1965 S. Rep., *supra* note 3, at 9.

[145] *See, e.g.*, Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969) ("The problem is . . . the inevitable temptation of a governmental litigant to give [(b)(5)] an expansive interpretation . . . ."); Committee on Masonic Homes v. NLRB, 414 F. Supp. 426, 431 (E.D. Pa. 1976) (defendant's argument would have rendered every document ever received exempt), *vacated on other grounds*, 556 F.2d 214 (3d Cir. 1977).

[146] For additional comment on exemption (b)(5), see Katz, *supra* note 101, at 1272-77; Project, *supra* note 9, at 1069-78; Note, *supra* note 15, at 936-43; Note, *Developments Under the Freedom of Information Act—1973*, 1974 Duke L.J. 251, 266-74; Note, *supra* note 29, at 189-96; Note, *The Freedom of Information Act and its Internal Memoranda Exemption: Time for a Practical Approach*, 27 Sw. L.J. 806, 806 (1973); 8 U. Mich. J.L. Ref. 329, 343-46 (1975). As to balancing interests under exemption (b)(5), see American Mail Line Ltd. v. Gulick, 411 F.2d 696, 703 (D.C. Cir. 1969).

[147] 5 U.S.C. § 552 (b)(6) (1970).

[148] Robles v. EPA, 484 F.2d 843, 845 (4th Cir. 1973). The *Robles* court refused to apply the exemption to a survey on the level of radioactivity in houses built above radioactive waste, stating that the exemption "has no relevancy to information that deals with physical things, such as structures." *Id.*

[149] *E.g.*, Rural Hous. Alliance v. Department of Agriculture, 498 F.2d 73 (D.C. Cir. 1974). It has been suggested that the *Robles* decision is probably correct on the basis of

with equal obliquity, as the manifestation of an intent not to limit the exemption to allow invasion of privacy.[149]

Further confusion surrounds the phrase "clearly unwarranted invasion of privacy."[150] Two constructions have been developed. The first balances individual privacy against the public's right to know and was conceived in *Getman v. NLRB*.[151] The *Getman* court ordered disclosure after determining that the purpose of the request—obtaining the names of employees eligible to vote in a union representation election—was potentially beneficial to the public with only a minimal invasion of privacy.[152] Although reaching a different result, the Third Circuit in *Wine Hobby U.S.A. v. IRS*[153] employed the balancing test in refusing to order disclosure when, even though the invasion of privacy would have been minimal, the information was requested for "private commercial exploitation" without benefit to the public.[154]

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the legislative history and a literal reading of the exemption. Comment, *The Freedom of Information Act's Privacy Exemption and The Privacy Act of 1974*, 11 HARV. C.R.-C.L. L. REV. 596, 603-04 (1976); 16 B.C. INDUS. & COM. L. REV. 240, 244-47 (1974). Later cases appear to involve only files of a personal nature. *E.g.*, Campbell v. Civil Service Comm'n, 539 F.2d 58, 61 (10th Cir. 1976) (personnel report); Sonderegger v. Department of Interior, 424 F. Supp. 847, 848 (D.C. Idaho 1976) (Teton Dam disaster claim form).

In Rabbitt v. Department of the Air Force, 383 F. Supp. 1065 (S.D.N.Y. 1974), "files" was construed to exclude application of the exemption to statements of witnesses, since "[t]he scope of [exemption] 6 which relates solely to 'files' cannot be stretched to cover" that information. *Id.* at 1069. For additional comment on "similar files," see Project, *supra* note 9, at 1079-80; Note, *supra* note 15, at 953-54; 27 U. FLA. L. REV. 848, 850-51 (1975).

[150] *See, e.g.*, Committee on Masonic Homes v. NLRB, 414 F. Supp. 426, 431 (E.D. Pa. 1976) (statute does not define what constitutes a "clearly unwarranted invasion of personal privacy"), *vacated on other grounds*, 556 F.2d 214 (3rd Cir. 1977).

[151] 450 F.2d 670, 674-77 (D.C. Cir. 1971). See Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966).

[152] 450 F.2d at 677. The court made two additional statements of importance. First, the disclosed information could be used only by the requesting party and then only for the purpose for which the information was released. The court did, however, recognize that its statement conflicted with § 522(a)(3) of the FOIA which makes disclosure applicable to "any person." *Id.* at 677 n.24. *See* Cooper v. Department of Navy, 558 F.2d 274, 276 (5th Cir. 1977) ("need is not a criterion for disclosure under the FOIA—if anyone can have the desired information everyone can"). Second, the balancing was necessitated by (b)(6) and was not applicable to other exemptions. 450 F.2d at 674 n.10; *see* 1966 H.R. REP., *supra* note 1, at 11; 1965 S. REP., *supra* note 3, at 9. For further analysis of the *Getman* opinion, see Comment, *supra* note 149, at 611-14; 40 GEO. WASH. L. REV. 527, 527 (1972).

[153] 502 F.2d 133 (3d Cir. 1974). The plaintiff, a distributor of amateur wine-making equipment, sought disclosure of the names and addresses of all persons registered with the Bureau of Alcohol, Tobacco and Firearms to produce wine for family use. *Id.* at 134.

[154] *Id.* at 137. Although the court recognized the conflict between "any person" as used in (a)(3) and the balancing test, the apparent inconsistency was glossed over, since the "any person" language was held applicable only to nonexempt material. *Id.* at 136; *see* 1965 S. REP., *supra* note 3, at 5-6. For criticism of this interpretation, see Project, *supra* note 9, at 1082-83; Comment, *supra* note 149, at 615-16. For comment on the *Wine Hobby*

The second interpretation is best represented by *Robles v. EPA*,[155] a Fourth Circuit case in which the only factor considered was the seriousness of the invasion as opposed to public interest or the requesting party's credentials.[156] The decision was founded on the "any person" language of section (a)(3) which, in the court's view, precluded balancing or any other test that would grant access to the information by some and deny access to others.[157] The resulting conflict with the *Getman* approach necessitated Supreme Court intervention.

In *Department of the Air Force v. Rose*,[158] the Court adopted the *Getman* rationale, noting that Congress' intent was to balance "the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny."[159] The exemption was construed to protect only against disclosure which would constitute a "clearly unwarranted invasion of privacy"[160] as identified through in camera inspections of the material to delete personal references and other identifying material.[161]

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case, see 16 B.C. INDUS. & COM. L. REV. 240, 240 (1975); 27 U. FLA. L. REV. 848, 848 (1975).

[155] 484 F.2d 843 (4th Cir. 1973). See note 148 and accompanying text *supra*.

[156] *Id.* at 845-48.

[157] *Id.*; *see* Davis, *supra* note 19, at 535-36 n.49, *quoting* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A.4, at 121 (Supp. 1970); Hulett, *supra* note 122, at 282-83. Another weakness of balancing is the confusion over what interests are to be balanced. *E.g.*, Disabled Officer's Ass'n v. Rumsfeld, 428 F. Supp. 454, 457 (D.D.C. 1977) (uncertainty exists as to what private and public interests are to be balanced).

The *Robles* test was criticized for favoring full disclosure in an area where the Supreme Court had recently expanded protection from disclosure, *see, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (right to privacy exists under the Constitution); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right of privacy entails freedom from unwarranted governmental intrusion), and for allowing disclosure in instances where public harm, not benefit, could result. *E.g.*, Project, *supra* note 9, at 1084; Comment, *supra* note 149, at 603-04; Note, *supra* note 100, at 486; 16 B.C. INDUS. & COM. L. REV. 240, 250 (1974).

[158] 425 U.S. 352 (1976). At issue was a request for case summaries of Air Force Academy hearings into cadet violations of the Academy's Honor and Ethics Code with personal references and other identifying references deleted. The district court granted summary judgment for the Air Force under exemption (b)(2). See notes 69 through 77 and accompanying text *supra*. On appeal, the circuit court remanded for in camera inspection and redaction. 495 F.2d 261 (2d Cir. 1974). For analysis of the circuit court opinion, see, *e.g.*, 34 MD. L. REV. 429 (1974); 6 U. TOL. L. REV. 215 (1974).

[159] 425 U.S. at 372. See note 76 and accompanying text, *supra*.

[160] *Id.* at 378-81.

[161] 425 U.S. at 381-82. The Court relied on 5 U.S.C. § 552 (a)(4)(B) (Supp. IV 1974) (authorizing in camera review), and 5 U.S.C. § 552(b) (Supp. V 1975) (permitting disclosure of severable portions of an exempt record), in affirming the circuit court's order. *Id.* at 373-74; *see* Sonderegger v. Department of Interior, 424 F. Supp. 847, 856 (D. Idaho 1976) (deletion of personal reference or other identifying information from dam disaster claim forms). The Air Force raised the argument that the phrase "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6) (1970), was applicable only to "similar files," and not to "personnel and medical files."

The Court did not, however, require a beneficial public purpose to preface disclosure.[162] If disclosure is made without regard to the purpose of the request,[163] and if privacy will preclude disclosure only when the invasion is "clearly unwarranted,"[164] the possibilities for unnecessary invasions of privacy may still be substantial.[165]

G. *Investigatory Files*

The seventh exemption from the general provisions of the FOIA[166] originally protected "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."[167] Although the Senate limited the exemption to files concern-

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Id. at 370-71. Had this argument been accepted, the exemption would have foreclosed disclosure of personnel and medical files regardless of the effect on privacy. *Id.*; *see* Ackerly v. Ley, 420 F.2d 1336, 1339-40 & n.3 (D.C. Cir. 1969) (court must determine whether exemption is properly invoked for medical files), *cited in* 425 U.S. at 373. The Court rejected this argument, reasoning that the exemption was not intended to prevent disclosure without a balancing of interests. *Id.* at 372-73. In any event, the Court later stated that the files sought could not be characterized as personnel files, but rather, were "similar files." *Id.* at 376-77.

[162] See notes 151 through 154 and accompanying text *supra*.

[163] By eliminating the variable factor of public benefit, the Court may have remedied one criticism of the balancing method—the possibility of allowing access to some people and denying it to others.

[164] See note 160 and accompanying text *supra*.

[165] *See* 49 TUL. L. REV. 678, 681 (1975). *See also* Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150, 168 (D.D.C. 1976) ((b)(6) designed to protect individuals from wide range of embarrassing disclosures, not merely derogatory information). An argument can be made that the courts can protect interests of confidentiality through redaction. Davis, *supra* note 19, at 798-99. But even the majority opinion in *Rose* recognized the serious threat to the privacy of certain cadets and acknowledged the fact that redaction could not eliminate all the risks. 425 U.S. at 380-81; *id.* at 384 (Burger, C.J., dissenting); Note, *supra* note 45, at 571-72.

It remains to be seen if Congress, based on its recently stated concern for privacy, see Privacy Act of 1974, 5 U.S.C. § 552a (Supp. IV 1974), will react to the *Rose* opinion as it did to the decisions in *EPA v. Mink*, see notes 48 through 52 and accompanying text *supra*, and *FAA v. Robertson*, see notes 94 through 96 and accompanying text *supra*. *See generally*, 425 U.S. at 384 (Burger, C.J., dissenting). For discussion of the effect of the Privacy Act on the FOIA, see Hulett, *supra* note 122; Comment, *supra* note 149; Note, *supra* note 100. For a case holding that the Privacy Act does not affect the weighing process of balancing public interest against the individual's privacy, see Sears, Roebuck & Co. v. GSA, 553 F.2d 1378, 1383 (D.C. Cir. 1977), *appeal docketed*, 45 U.S.L.W. 3775 (U.S. May 23, 1977) (No. 76-1642).

[166] 5 U.S.C. § 552(b)(7) (Supp. V 1975).

[167] 5 U.S.C. § 552(b)(7) (1970) (current version at 5 U.S.C. § 552(b)(7) (Supp. V 1975)). Although the legislative intent behind the exemption is not completely clear, *compare* Note, *supra* note 15, at 943 & n.266, *with* Project, *supra* note 9, at 1087-88, three major purposes can be discerned: (1) To protect investigatory files from premature disclosure. 1965 S. REP., *supra* note 3, at 9; Wellford v. Hardin, 444 F.2d 21, 23 (4th Cir. 1971)

ing criminal prosecutions,[168] the courts have applied the exemption to all enforcement proceedings.[169] This judicial expansion highlighted the policy considerations by which the courts were forced to weigh the value of public access to agency information against the attendant interference with enforcement proceedings. Accordingly, conflicting interpretations of (b)(7) became commonplace.

In *Bristol-Meyers v. FTC*,[170] for example, the District of Columbia Circuit held that the exemption justified withholding only when there is an "imminent" possibility of enforcement proceedings,[171] thus favor-

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(purpose of (b)(7) is to prevent premature discovery by defendant in enforcement proceedings); Bristol-Myers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir.) (purpose of exemption is to limit litigant to discovery available without FOIA), *cert. denied*, 400 U.S. 824 (1970); Project, *supra* note 9, at 1087-88; Note, *supra* note 15, at 943. (2) To protect the confidentiality of investigatory procedures and techniques. 1965 S. REP., *supra* note 3, at 3; Center for Nat'l Policy Review v. Weinberger, 502 F.2d 370, 374 (D.C. Cir. 1974) (policy of exemption is to protect investigative techniques from disclosure); Aspin v. Department of Defense, 491 F.2d 24, 29-30 (D.C. Cir. 1973) (disclosure of investigatory files would reveal investigative techniques to public); Frankel v. SEC, 460 F.2d 813, 817 (2d Cir.) (future law enforcement proceedings would be hindered by disclosure of investigative techniques), *cert. denied*, 409 U.S. 889 (1972); Note, *supra* note 15, at 944; Note, *Backdooring the NLRB: Use and Abuse of the Amended FOIA for Administrative Discovery*, 8 LOY. U.L.J. 145, 148 (1976). (3) To protect confidential sources of information. *E.g.*, Frankel v. SEC, 460 F.2d 813, 817-18 (2d Cir.) (disclosure of sources of information would severely limit voluntary information in the future), *cert. denied*, 409 U.S. 889 (1972); Evans v. Department of Transp., 446 F.2d 821, 823 (5th Cir. 1971) (investigative effectiveness of agency would be limited if information could not be given in confidence), *cert. denied*, 405 U.S. 918 (1972); Cowles Communication v. Department of Justice, 325 F. Supp. 726, 727 (N.D. Cal. 1971) (informant will not inform without assurance of confidentiality); Katz, *supra* note 101, at 1281; Note, *supra* note 15, at 944; Project, *supra* note 9, at 1093; Note, *Backdooring the NLRB: Use and Abuse of the Amended FOIA for Administrative Discovery*, *supra*, at 148; 51 TEX. L. REV. 119, 123 (1972).

[168] 1965 S. REP., *supra* note 3, at 9. *But see* 1966 H.R. REP., *supra* note 1, at 11 (exemption interpreted to include criminal, civil and administrative enforcement proceedings).

[169] *E.g.*, Moore-McCormick Lines, Inc. v. I.T.O. Corp. of Baltimore, 508 F.2d 945, 949 (4th Cir. 1974) (legislative history indicates exemption applicable to all enforcement proceedings); Center for Nat'l Policy Review v. Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974) ("law enforcement" extends beyond criminal proceedings); Rural Hous. Alliance v. Department of Agriculture, 498 F.2d 73, 81 n.46 (D.C. Cir. 1974) (both civil and criminal enforcement proceedings protected by exemption seven).

[170] 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970). The case involved a request for the FTC to produce certain documents relating to a rulemaking proceeding initiated by the FTC pursuant to "extensive staff investigation, . . . accumulated experience and available studies and reports." 32 FED. REG. 9843 (July 6, 1967), *quoted in* 424 F.2d at 937.

[171] 424 F.2d at 939-40. Significantly, the only purpose the court considered was prevention of premature disclosure, see note 167 *supra*, and thus it concluded that disclosure was proper since the FTC planned no further enforcement proceedings against the plaintiff. *Id.* at 939. By focusing only on premature disclosure, *Bristol-Myers* in effect held that

ing public access.[172] The Fifth Circuit, however, shifted the emphasis from public access to the effect of disclosure on enforcement proceedings in holding that (b)(7) protects confidential procedures and sources of information even though the investigation has ended.[173] Responding to

files once exempt under (b)(7) could not be exempt after the termination of enforcement proceedings. For cases following this rationale, see Wellford v. Hardin, 444 F.2d 21, 24 (4th Cir. 1971) (information not within exemption since those investigated had been given the information; no prosecution contemplated); Black v. Sheraton Corp., 371 F. Supp. 97, 102 (D.D.C. 1974) (any enforcement hopes were long dead; disclosure ordered); Stern v. Richardson, 367 F. Supp. 1316, 1321 (D.D.C. 1973) ("The government has not demonstrated that the requested documents . . . relate to any ongoing investigation or that disclosure would jeopardize any future law enforcement proceedings."); Legal Aid Soc'y v. Schultz, 349 F. Supp. 771, 777 (N.D. Cal. 1972) (evidence did "not show a prospect of future enforcement concrete enough to merit allowing the [Treasury] Department to refuse to disclose"); Philadelphia Newspapers, Inc. v. HUD, 343 F. Supp. 1176, 1179 (E.D. Pa. 1972) (court relied on "premature disclosure" as justification to show disclosure was in order).

[172] 424 F.2d at 939. In line with the holding in *Bristol-Meyers* is Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971), in which the Fourth Circuit held that nondisclosure of information was improper where the parties to the proceeding already had access to the material. *Id.* at 23-24. Although the court followed *Bristol-Myers* as to premature disclosure, it went further by stating that since the requesting party already had the information, confidentiality was no reason for withholding the material. *Id.* at 24. *See generally* 40 FORDHAM L. REV. 921, 927-28 (1972).

[173] Evans v. Department of Transportation, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972), held that the refusal to disclose was justified since it might impair the agency's ability to obtain information from voluntary sources. 446 F.2d at 824. The plaintiff, a former commercial airline copilot, sought disclosure of certain letters received by the FAA. The complaint alleged that the "letters contained patently false and libelous allegations regarding plaintiff's mental fitness and abilities" upon which the FAA had relied in summarily suspending plaintiff's medical certificate. Rejecting a *Bristol-Myers* approach, the court stated that Congress did not intend to condition disclosure solely on the termination of enforcement proceedings. *Id.* The value of the decision as an effective argument against *Bristol-Myers*, however, is questionable. First, the discussion of (b)(7) is arguably dictum since the information was exempt under the (b)(5) exemption, see section II. *C. supra*, as the Federal Aviation Act of 1958 requires the withholding of information not required by the public interest and inimical to the informant. 49 U.S.C. § 1504 (1970). Second, the court failed to discuss the holding in *Bristol-Myers*.

Subsequently, in Frankel v. SEC, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972), the Second Circuit confronted a suit by shareholders for release of information obtained during an investigation of a corporation by the SEC. In deciding whether the investigatory file exemption remains in effect after enforcement proceedings terminate, the court held that the exemption would continue to protect confidential procedures and sources of information even though the investigation had ended. 460 F.2d at 817-18. Obviously, (b)(7) was significantly expanded. *See generally* Note, *supra* note 167, at 151-52; 41 GEO. WASH. L. REV. 93 (1972); 85 HARV. L. REV. 861 (1972); 4 ST. MARY'S L.J. 219 (1972); 51 TEX. L. REV. 119 (1972); 47 TUL. L. REV. 1136 (1973). For other cases holding that information may be withheld after termination of enforcement proceedings for the protection of informers and investigative techniques, see Aspin v. Department of Defense, 491 F.2d 24 (D.C. Cir. 1973) ((b)(7) exemption viable after termination of investigation

this expansion, the District of Columbia Circuit seemingly discarded its sensible *Bristol-Meyers* approach in *Weisberg v. Department of Justice*,[174] where information which was neither used nor planned for use in any criminal proceeding was held exempt.[175] Moreover, there was no indication in *Weisberg* that disclosure would reveal confidential procedures or sources of information.[176] Under the court's new approach, in-

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and enforcement proceedings); Wellman Indus., Inc. v. NLRB, 490 F.2d 427 (4th Cir.) (affidavits obtained for law enforcement purposes are protected), *cert. denied*, 414 U.S. 834 (1974); Weisberg v. United States Dep't of Justice, 489 F.2d 1195, 1197 (D.C. Cir. 1973) (en banc) (files compiled on President Kennedy's death held investigatory in nature and for enforcement purposes; disclosure exempted), *cert. denied*, 416 U.S. 993 (1974); Evans v. Department of Transp., 446 F.2d 821, 824 (5th Cir. 1971) (information exempt when disclosure would prejudice agency's protection of public airline passengers), *cert. denied*, 405 U.S. 918 (1972); Cowles Communications, Inc. v. Department of Justice, 325 F. Supp. 726, 727 (N.D. Cal. 1971) (investigatory files for law enforcement purposes exempt whether or not followed by enforcement action). *See generally* Clark, *supra* note 52, at 759-61; Katz, *supra* note 101, at 1278-79; Project, *Federal Administrative Law Developments 1970,* 1971 DUKE L.J. 149, 180-82; Project, *supra* note 9, at 1092 n.783; Note, *supra* note 45, at 569-71; Note, *supra* note 15, at 945-47; Note, *Developments Under the Freedom of Information Act—1973, supra* note 146, at 274-80; Note, *Developments Under the Freedom of Information Act—1972,* 1973 DUKE L.J. 178, 200-05; Note, *supra* note 29, at 201-05; Note, *supra* note 167, at 150-53; 40 FORDHAM L. REV. 921 (1972); 41 GEO. WASH. L. REV. 93 (1972); 85 HARV. L. REV. 861 (1972); 51 TEX. L. REV. 119 (1972); 47 TUL. L. REV. 1136 (1973); 38 U. CIN. L. REV. 570 (1970).

Frankel also rejected the dissent's suggestion of an in camera inspection, 460 F.2d at 818, 820 (Oakes, J., dissenting), thus effectively foreclosing disclosure of all information, properly exempt or not, ad infinitum. Other courts, however, have permitted such in camera review. *See* Aspin v. Department of Defense, 491 F.2d 24, 27 (D.C. Cir. 1973) (trial court's duty is to determine how and under what circumstances the files were compiled); Weisberg v. Department of Justice, 489 F.2d 1195, 1202 (D.C. Cir. 1973) (en banc) (district court must determine applicability of the exemption), *cert. denied*, 416 U.S. 993 (1974); *cf.* Ditlow v. Brinegar, 494 F.2d 1073, 1074 (D.C. Cir.) (per curiam) (court refused to look at actual injury to agency), *cert. denied*, 419 U.S. 974 (1974). Although the authorization for in camera reviews did not come until the 1974 amendment, 5 U.S.C. § 552 (a)(4)(B) (Supp. V 1975), several courts had already found government affidavits inadequate for the purpose of determining if the information fell within the exemption. *E.g.*, Evans v. Department of Transp., 446 F.2d 821, 823 (5th Cir. 1971) (affirmed trial court's summary judgment only after in camera inspection of information), *cert. denied*, 405 U.S. 918 (1972); Ash Grove Cement Co. v. FTC, 371 F. Supp. 370, 374 (D.D.C. 1973) (some, but not all, evidence required for in camera inspection), *rev'd*, 511 F.2d 815 (D.C. Cir. 1975); Stern v. Richardson, 367 F. Supp. 1316, 1319 (D.D.C. 1973) (in camera inspection showed documents to be outside protection of exemption); Cowles Communications, Inc. v. Department of Justice, 325 F. Supp. 726, 727 (N.D. Cal. 1971) (whether an investigatory file is for enforcement purposes is to be decided after in camera review).

[174] 489 F.2d 1195 (D.C. Cir. 1973) (en banc), *cert. denied*, 416 U.S. 993 (1974).

[175] 487 F.2d at 1197. The plaintiff was an author seeking information for use in a book on the assassination of President Kennedy.

[176] While not discussing the possible effect of revealing confidential information, the court did express concern for disclosure of FBI files after each investigation. *Id.* at 1201. Note, *The Investigatory Files Exemption to the FOIA: The D.C. Circuit Abandons Bristol-*

formation gathered in the course of a law enforcement investigation was exempt per se, regardless of the public's interest in obtaining the information.[177] The end result was a mechanical, strictly literal test which violated both the spirit of the Act and the specific intent of the exemption.[178] Faced with yet another defeat at the hands of the judiciary, Congress amended (b)(7) in 1974.[179]

The amended exemption provides six instances where "investigatory records compiled for law enforcement purposes" may be

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Myers, 42 GEO. WASH. L. REV. 869, 886 (1974). For further discussion of *Weisberg*, see Note, *Developments Under the Freedom of Information Act—1973*, *supra* note 146, at 277; Note, *supra* note 167, at 153. Additionally, the court cited *Mink*, see notes 42 through 47 and accompanying text *supra*, for the proposition that when the government claimed a (b)(7) exemption, the judicial function of the court was confined to a determination of whether the files were properly classified as "investigatory." 489 F.2d at 1197.

[177] In Aspin v. Department of Defense, 491 F.2d 24 (D.C. Cir. 1973), the same court extended the *Weisberg* rationale beyond FBI files to an investigation of the My Lai incident. *Id.* at 29-30. Here, plaintiff was seeking public disclosure of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident, otherwise known as the Peers Commission Report. *Id.* at 24. For further discussion of *Aspin*, see Note, *Developments Under the Freedom of Information Act—1973*, *supra* note 146, at 277-78; Note, *supra* note 176, at 887-89; Note, *supra* note 167, at 153-55. *See also* Ditlow v. Brinegar, 494 F.2d 1073 (D.C. Cir.) (per curiam), *cert. denied*, 419 U.S. 974 (1974).

Finally, in Center for Nat'l Policy Review v. Weinberger, 502 F.2d 370 (D.C. Cir. 1974), the circuit reached the broadest possible interpretation of (b)(7), holding that an investigation exists "when the inquiry departs from the routine and focuses with special intensity upon a particular party." *Id.* at 373-74. Accordingly, HEW's Title VI Civil Rights Compliance Records were exempt because of the possibility of a further proceeding to withhold funding. This interpretation of "investigatory" had begun with the holding in Rural Hous. Alliance v. Department of Agriculture, 498 F.2d 73 (D.C. Cir. 1973), which stated that a file must be both investigatory *and* compiled for law enforcement purposes. *Id.* at 82 n.48. The court in *Weinberger* acknowledged the two elements, stating that they apparently merge and interact. 502 F.2d at 374. *E.g.*, Project, *supra* note 9, at 1090-91; Note, *supra* note 108, at 450-55.

[178] *See, e.g.*, Comment, *Amendment of the Seventh Exemption Under the Freedom of Information Act*, 16 WM. & MARY L. REV. 697, 709 & n.59 (1975) (*Weinberger* ignored "both the reasons behind the exemption and the interests in favor of disclosure."); Note, *supra* note 167, at 155 (same); Note, *supra* note 108, at 454 (practically any government agency could withhold any information under this definition of (b)(7)). For further analysis of the *Aspin*, *Ditlow*, and *Weinberger* opinions, see Clark, *supra* note 52, at 761; Project, *supra* note 9, at 1090-91; Note, *supra* note 45, at 569-70; Note, *supra* note 108, at 452-55; Note, *supra* note 176, at 887-90; Note, *supra* note 167, at 153-56; Note, *Amendment of the Seventh Exemption Under the Freedom of Information Act*, *supra*, at 708-09; 45 GEO. WASH. L. REV. 114, 119 (1976).

[179] 120 CONG. REC. 17033, 17039-40 (daily ed., May 30, 1974). *See generally* Clark, *supra* note 52, at 761-63; Project, *supra* note 9, at 1096-97 & n.802; Note, *The Freedom of Information Act—A Potential Alternative to Conventional, Criminal Discovery*, 14 AM. CRIM. L. REV. 73, 112 (1976); Note, *supra* note 167, at 156-58; 45 GEO. WASH. L. REV. 114, 119-20 (1976). For the legislative history of the amendment, see Note, *supra* note 167, at 156-59.

withheld.[180] The first provides exemption only to the extent that disclosure would "interfere with enforcement proceedings"[181] and has engendered the greatest amount of litigation, especially in NLRB proceedings.[182] One of the more significant cases on this issue is *Title Guarantee Co. v. NLRB*,[183] in which the Second Circuit reversed a decision ordering disclosure of witness' statements obtained during an NLRB investigation of the plaintiff's alleged unfair labor practices.[184] After a review of the amendment's legislative history, the court concluded that Congress had not intended that the amendment overrule prior decisions which made discovery procedures discretionary on the part of the NLRB trial examiner.[185] Absent clear congressional intent, disclosure would not be required since it could interfere with unfair labor practice proceedings.[186] Recognizing the evils that the amendment was intended to correct,[187] however, the court refused to adopt the general proposition that all

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[180] 5 U.S.C. § 552 (b)(7) (Supp. V 1975).

[181] 5 U.S.C. § 552 (b)(7)(A) (Supp. V 1975). *See* National Pub. Radio v. Bell, 431 F. Supp. 509, 513 (D.D.C. 1977) (Congress intended the 1974 amendments to limit (b)(7) to situations where disclosure could harm concrete prospective enforcement proceeding).

[182] One reason for the intensity of litigation in this area is that the NLRB is not governed by the Federal Rules of Civil Procedure in conducting its proceedings. NLRB v. Interboro Contractors, Inc., 432 F.2d 854, 858-60 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971); *accord,* NLRB v. Lizdale Knitting Mills, Inc., 523 F.2d 978, 980 (2d Cir. 1975). *But see* NLRB v. Rex Disposables, Inc., 494 F.2d 588, 592 (5th Cir. 1974) (rejected *Interboro* and applied fairness standards of discovery); *cf.* NLRB v. Valley Mold Co., 530 F.2d 693, 695 (6th Cir.) (formulation of rules of discovery, within requirements of due process, is responsibility of NLRB), *cert. denied*, 97 S. Ct. 77 (1976).

[183] 534 F.2d 484 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976). Litigated prior to *Title Guarantee* was the issue of whether the exemption extended beyond the life of an investigation. The court in Kaminer v. NLRB, 90 L.R.R.M. 2269, 2271 (S.D. Miss. 1975), held that it did not. Likewise, Mobil Oil Corp. v. FTC, 406 F. Supp. 305, 313 (S.D.N.Y. 1976), held that the mere pendency of enforcement proceedings alone does not make (b)(7) applicable.

[184] The district court had made the order following an in camera review of the material pursuant to 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975). 407 F. Supp. at 508.

[185] *Id.* at 491-92. The prior decisions to which the court alluded were NLRB v. Martin A. Gleason Co., 534 F.2d 466, 479 (2d Cir. 1976) (courts have been generous in supporting denials of employer's request for prehearing statements); NLRB v. Interboro Contractors, Inc., 432 F.2d 854, 857-58 (2d Cir. 1970) (NLRB not required to adopt discovery procedures), *cert. denied*, 402 U.S. 915 (1971); Henry L. Siegel Co. v. NLRB, 328 F.2d 25, 27 (2d Cir. 1964) (employer's request to employees to furnish statements made to investigator were violations of the NLRA). The court stated that had Congress intended to overrule the NLRB discovery cases, it could have done so by amending § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1970). 534 F.2d at 491; *see* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975) (fact that party is in litigation neither increases nor decreases rights under the FOIA).

[186] 407 F. Supp. at 491. In making this determination, the court acknowledged the coercive element in the employer-employee relationship.

[187] See notes 178 through 180 and accompanying text *supra*.

investigative information would be "per se nondisclosable."[188]

Although *Title Guarantee* has been followed in several subsequent cases,[189] the decision is subject to rather fundamental criticism. First, the court accepted the Board's allegation that harm would result from disclosure without requiring a showing that harm would in fact result.[190] This acquiescence to a mere possibility of harm standard would permit withholding solely on a showing that the information was obtained pursuant to an investigation of a pending proceeding. Clearly, this result is contrary to the purpose of the amendment.[191] Second, the statute leaves no doubt that interference must be proved before the exemption will apply.[192]

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[188] 534 F.2d at 491; *see* Harvey's Wagon Wheel, Inc. v. NLRB, 550 F.2d 1139, 1143 (9th Cir. 1976) (no per se exemption given to nonemployee statement). *But see* New England Medical Center Hosp. v. NLRB, 548 F.2d 377, 382-83 (1st Cir. 1976) (per se exemption given to statements of nonemployees).

[189] *E.g.*, NLRB v. Hardeman Garment Corp., 557 F.2d 559, 561 (6th Cir. 1977) *(Title Guarantee* cited for the proposition that all statements of employees relating to pending unfair labor practice proceedings are exempt); Cessna Aircraft Co. v. NLRB, 542 F.2d 834, 835 (10th Cir. 1976) *(Title Guarantee* cited as support for rejection of requesting party's contentions); Climax Molybdenum Co. v. NLRB, 539 F.2d 63, 65 (10th Cir. 1976) *(Title Guarantee* cited to support holding that amendment protects employees' statements to same extent they were protected under the former provisions); Roger J. Au & Son, Inc. v. NLRB, 538 F.2d 80, 83 (3d Cir. 1976) (concurring with *Title Guarantee* that amendment was not meant to expand discovery rights); Goodfriend W. Corp. v. Fuchs, 535 F.2d 145, 146 (1st Cir.) (court adopted *Title Guarantee* in exempting statements obtained from employees during unfair labor practice proceeding), *cert. denied*, 97 S. Ct. 257 (1976). *But see, e.g.*, Marathon LeTourneau Co. v. NLRB, 414 F. Supp. 1074, 1079 (S.D. Miss. 1976) (*Title Guarantee* lacks precedential value as it follows *Interboro*); Capital Cities Communications, Inc. v. NLRB, 409 F. Supp. 971, 977 (N.D.Cal. 1976) (declined to follow *Title Guarantee* because of inadequate consideration given to the area in which the information was sought); *cf.* Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1135 (4th Cir. 1977) (refused to apply *Title Guarantee* to back pay proceeding). *Irving* held that while (b)(7)(A) was not applicable to back pay proceedings because of the lack of employer pressure upon the employee, it made clear that the exemption was applicable to unfair labor practice proceedings in language which indicates a per se exemption. *Id.* at 1136.

[190] This failure to require proof of harm possibly resulted from the court's preoccupation with its analysis of NLRB authority over discovery procedure and its failure to consider the request under the FOIA. *See generally* Note, *supra* note 167, at 170-71; 45 GEO. WASH. L. REV. 114, 123 (1976).

[191] In effect, the amended exemption was considered applicable only to closed investigatory files. 534 F.2d at 492. *But see* Mobil Oil Corp. v. FTC, 406 F. Supp. 305, 313 (S.D.N.Y. 1976) (enforcement proceeding alone does not make (b)(7) applicable). In view of the statement in *Title Guarantee* that not all investigatory information would be "per se nondisclosable," 534 F.2d at 491, the court could be either requiring an allegation of harm or applying the rationale only to NLRB proceedings.

[192] Indeed, the district court had found that disclosure would not harm the proceedings. 407 F. Supp. 498, 505 (S.D.N.Y. 1975). For further analysis of *Title Guarantee*, see Note, *supra* note 179, at 119-21; Note, *The Right to Disclosure of NLRB Documents Under the Freedom of Information Act*, 5 FORDHAM URB. L.J. 119, 123-27 (1976); Note, *supra* note

The First Circuit has not only followed the *Title Guarantee* rationale but has succeeded in further defeating the legislative intent behind the amended exemption. In *New England Medical Center Hospital v. NLRB*,[193] the plaintiff sought disclosure of files of both pending and terminated unfair labor practice proceedings. Addressing first the applicability of the exemption to statements in open files from persons who were not employees,[194] the court acknowledged that the agency could justify nondisclosure only by showing that release of the information would interfere with enforcement procedures.[195] The court nevertheless proceeded, without such a showing by the agency, to hypothesize ways in which disclosure could interfere with agency proceedings.[196] While acknowledging that in camera review would eliminate much of the harm accompanying premature disclosure, the procedure was rejected as a "crippling delay."[197] With respect to closed files, however,[198] the court stated that since the records related to the pending proceeding, the fact that they were labeled "closed" did not bar exemption.[199] Further, the court declined to express an opinion on whether the closed

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167, at 167-71; 45 GEO. WASH. L. REV. 114, 114 (1976). For an excellent analysis of the fallacies and weaknesses of NLRB arguments justifying exemption, see Fuselier & Moeller, *NLRB Investigatory Records: Disclosure Under the Freedom of Information Act*, 10 U. RICH. L. REV. 541, 541 (1976).

[193] 548 F.2d 377 (1st Cir. 1976).

[194] The court noted that while the question of employer leverage over employees would not apply to nonemployees, interference could still occur as the release of the information would afford the employer the opportunity to frustrate the proceedings or construct defenses. 534 F.2d at 491.

[195] 548 F.2d at 382, *citing* 120 CONG. REC. 17033 (daily ed. May 30, 1974) (remarks of Senator Hart).

[196] 548 F.2d at 382-83. The court stated that "release would . . . by injecting judicial supervision of pretrial discovery, threaten the agency's ability to prosecute cases with dispatch." *Id.* at 382-83. This position was justified since "[i]t was the automatic continuing exemption of records even after a file had become totally inactive that led Congress to amend Exemption 7." *Id.* at 384.

[197] *Id.* at 385; *see, e.g.*, Climax Molybdenum Co. v. NLRB, 539 F.2d 63, 65 (10th Cir. 1976) (courts are "ill-fitted" to make case-by-case determinations of whether a particular file's disclosure would interfere with enforcement proceedings); Roger J. Au & Son, Inc. v. NLRB, 538 F.2d 80, 83 (3d Cir. 1976) (1974 amendment did not purport to expand discovery rights "with respect to statements of witnesses in NLRB litigation or to transfer the adjudication of such discovery disputes from the NLRB to the courts"). The court added that the district court could require the Board to verify relevant material by affidavit. 548 F.2d at 385. *See, e.g.*, Climax Molybdenum Co. v. NLRB, 539 F.2d 63, 65 (10th Cir. 1976) (no need for express showing in each case to justify (7)(A) exemption).

[198] The closed files concerned two employees charged with conspiring to steal hospital property with the instigator of the proceeding and contained statements by both employees and nonemployees. All three employees had engaged in union organizing activities. The Board had stated that it "might" reopen the closed files and planned to call as witnesses many of those involved in the previous investigations. 548 F.2d at 381, 385.

[199] *Id.* at 385-86. Again, the court noted that the Board was under a duty to justify nondisclosure with an appropriate showing. *Id.* at 386. However, as with the open files,

files were permanently exempt insofar as disclosure could impair future proceedings by discouraging employee cooperation in future investigations.[200]

Just as had *Title Guarantee*, *New England Medical Center* ignored the unique character of an FOIA proceeding, directing attention instead to the discovery aspect of the case.[201] Both the purpose and language of the amendment were ignored in the court's failure to require an agency showing of interference and in its rejection of in camera inspections.[202] Moreover, by declining to comment on the possibility of a permanent exemption for the closed files, the court came dangerously close to approving the same "wooden and mechanical test" that was responsible for the 1974 amendment of (b)(7).[203]

Judicial failure to apply properly the FOIA (b)(7) exemption originally necessitated its amendment. Congress' response provided for in camera inspection and stressed agency justification of nondisclosure. Subsequent decisisons by the courts, however, have made it clear that further delineation is needed. If the trend toward preamendment application continues without Supreme Court guidance, Congress will again be forced to intervene.[204]

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the court fashioned its own theories of interference. *Id.* at 386-87.

[200] *Id.* at 386-87. Prior to this point in the opinion, the court had stressed the temporary nature of the restraint. *Id.* at 384-86.

[201] The amended exemption does not contain the proviso "except to the extent available by law to a party other than an agency," 5 U.S.C. § 552 (b)(7) (1970) (current version at *id.* (Supp. V 1975)), and, consequently, the Board's argument that the FOIA did not provide greater access to investigation files than permitted by the Rules and Regulations of the Board is no longer plausible. Fuselier & Moeller, *supra* note 192, at 546.

[202] The court rejected in camera review as being a "crippling delay." 548 F.2d at 384. *But cf.* Irons v. Gottschalk, 548 F.2d 992, 996 (D.C.Cir. 1976) (FOIA mandates disclosure regardless of time needed). In so doing, however, the *Medical Center* court failed to take into consideration the possibility that in an appropriate case, such as when there is little material or when the court does not find it necessary to inspect all the material, there would be no delay. Also, an abbreviated in camera inspection would be sufficient when reliance on the exemption is blatantly unjustified. *See, e.g.*, Williams v. IRS, 345 F. Supp. 591, 594 (D. Del. 1972) (in camera inspection solely for purpose of determining whether files were compiled for law enforcement purposes), *aff'd per curiam*, 479 F.2d 313 (3d Cir.), *cert. denied*, 414 U.S. 1024 (1973). *See also* Engle, *supra* note 8, at 205-06; Giannela, *supra* note 8, at 223-24; Nader, *supra* note 8, at 9-12. In its discussion of in camera inspection the court spoke in terms of discovery and not in the proper FOIA terms.

[203] *See, e.g.*, 120 CONG. REC. 9330-31 (daily ed. May 30, 1974).

[204] Exemptions (7)(B) to (7)(F) have been the source of little litigation and therefore remain largely uninterpreted. Exemption (7)(B) has yet to be considered by the courts. For discussion of (7)(B), see Note, *supra* note 179, at 125-26.

The privacy exemption, (7)(C), has been considered in several cases. In Deering Milliken, Inc. v. Irving, 548 F.2d 1131 (4th Cir. 1977), the court noted that great weight should be given to the privacy claim in exemption (7)(C), as opposed to exemption (b)(6), and stated that a balancing test was appropriate in dealing with information concerning

III. Conclusion

The Freedom of Information Act was enacted in a bold attempt to make public the operations of the federal government. While it is a vast improvement over its predecessor, the Act is plagued with serious deficiencies which severely limit its effectiveness. Instead of providing the "definitive guidelines" needed to aid the courts in interpreting its provisions, the Act is instead fraught with ambiguities, chief among which are the exemptions. Although one can only speculate as to the reason the exemptions were drafted with such imprecision, the fact remains that they are a prolific source of litigation. The remedy may be a complete revision of the Act with Congress using experience as a guide to future legislation. The ultimate remedy may be to specify exactly what may or may not be disclosed. In sensitive areas this would probably entail sacrificing disclosure for certainty in application. The result, while certainly not as liberal a disclosure policy as the drafters intended, may in fact be more liberal than that which is often obtained by stringent judicial interpretation.

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back pay claimants. *Id.* at 1136 & n.7. The court cited as its authority Department of the Air Force v. Rose, 425 U.S. 352 (1976), a case dealing with (b)(6), not (7)(C). See notes 158 through 165 and accompanying text *supra*. *See* Tax Reform Research Group v. IRS, 419 F. Supp. 415, 419 (D.D.C. 1976) ((7)(C) is patterned after (b)(6)); Committee on Masonic Homes v. NLRB, 414 F. Supp. 426, 432 (E.D. Pa. 1976) (balancing test appropriate for (7)(C)), *vacated on other grounds*, 556 F.2d 214 (3d Cir. 1977). For further discussion see, Fuselier & Moeller, *supra* note 192; at 550-51; Note, *supra* note 179, at 122-24.

Exemption (7)(D), which protects the identity of confidential sources, requires either an expressed or reasonably implied assurance of confidentiality. Conf. Rep., *supra* note 48, at 12; *see* Committee on Masonic Homes v. NLRB, 414 F. Supp. 426, 433 (E.D. Pa. 1976) (agency must show information received in confidence), *vacated on other grounds*, 556 F.2d 214 (3d Cir. 1977). *But see* Furr's Cafeterias, Inc. v. NLRB, 416 F. Supp. 629, 631 (N.D. Tex. 1976) (FOIA does not respect promise of confidentiality in noncriminal proceeding). For a discussion of the indistinguishable results of the courts in dealing with (7)(D), see Fuselier & Moeller, *supra* note 192, at 552-53; Note, *supra* note 179, at 124-25.

Exemption (7)(E), protecting investigation techniques, has been considered in several cases, *see, e.g.*, Shaver v. Bell, 433 F. Supp. 438, 441 (N.D. Ga. 1977) (an example of investigative technique entitled to protection is the use of bait money in the investigation of criminal offenses); Firestone Tire & Rubber Co. v. Coleman, 432 F. Supp. 1359, 1366 (N.D. Ohio 1976) ((7)(E) not applicable as agency did not show that disclosure would reveal investigative techniques and procedures); Electronic Memories & Magnetics Corp. v. United States, 431 F. Supp. 356, 360 (C.D. Cal. 1977) (court applied (7)(E) without discussion), while (7)(F), protecting the physical safety of law enforcement officers, has been considered by only one court, *see* Shaver v. Bell, 433 F. Supp. 438, 441 (N.D. Ga. 1977) (deletion of names and information that might lead to identity of personnel involved in criminal investigation held appropriate). See Conf. Rep., *supra* note 48, at 11.

SECTION 5: GROWTH OR DEMISE OF STATUTORY VOTING RIGHTS?

The Voting Rights Act,[1] passed in 1965 and amended in 1970[2] and 1975,[3] has drawn such approbatory classifications as "perhaps the most important piece of civil rights legislation in this century"[4] and "the most successful piece of civil rights legislation ever enacted."[5] This overwhelming approval was evoked in light of the high number of black voter registrations in the South[6] and the unprecedented increase in the number of black elected officials[7] obtained as a result of the Act. Functionally, such testimonials evidence the Act's success as a "broadly remedial"[8] tool. Their optimism, however, does not take into account the impact of recent Supreme Court decisions which reflect a seemingly inconsistent view of the legislation's purpose. Additionally, the use of the Voting Rights Act by private parties as a vehicle to secure the rights guaranteed by the fifteenth amendment[9] has contributed increasingly to the case law interpreting the Act.

When teamed with Congress' avowed intention to extend and expand the Act,[10] the Supreme Court's developing involvement in voting

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[1] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973 to 1973p (1970)).

[2] Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315 (codified at 42 U.S.C. §§ 1973 to 1973bb-4 (1970)).

[3] Voting Rights Act of 1965—Extension, Pub. L. No. 94-73, 89 Stat. 405 (codified at 42 U.S.C. §§ 1973 to 1973bb-2 (Supp. V 1975)).

[4] *Extension of the Voting Rights Act of 1965: Hearings on S. 1297 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 1 (1975) (remarks of Sen. Tunney) [hereinafter cited as *1975 Hearings*].

[5] *Id.* at 271 (remarks of Mr. Katzenbach, then an executive member of the Lawyers' Committee for Civil Rights Under Law, and Attorney General at the time the Act was passed); *see* S. REP. No. 94-295, 94th Cong., 1st Sess. 11, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 774, 777 ("the most effective civil rights legislation ever passed") [hereinafter cited as 1975 S. REP.].

[6] Voter registration is estimated to have increased in excess of 1.1 million. UNITED STATES COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 41 (1975) [hereinafter cited as COMMISSION REPORT].

[7] *Id.* at 377-94, *with portions reprinted in 1975 Hearings, supra* note 4, at 102-03. Participation figures for Spanish surnamed and Mexican-American officials are detailed in *id.* at 104.

[8] United Jewish Organizations of Williamsburg, Inc. v. Carey, 430 U.S. 144, 156 (1977).

[9] The amendment provides simply that "the right . . . to vote shall not be denied or abridged . . . on account of race [or] color." U.S. CONST. amend. XV, § 1. The Act "is designed primarily to enforce the 15th amendment." H.R. REP. No. 439, 89th Cong., 1st Sess. 1, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 2437, 2437 [hereinafter cited as 1965 H.R. REP.].

[10] In addition to extending the Act for 10 years, a stated objective of the 1975 amendment was "to expand the coverage of the Act to certain jurisdictions in which language

cases[11] signals a coming of age for this heretofore relatively idle statute. Significantly, the fact that once arguable points have lately been "nailed down" not only advises discriminatees of their rights but also informs potential discriminators of the limits of those rights.[12] The purpose of this Comment is to chronicle the unfolding case law surrounding the Voting Rights Act and to speculate on its future.

I. Background

Although the Voting Rights Act and its amendments include a number of specific provisions designed to enforce the right to vote,[13] the single most important is section 5.[14] Considerable controversy still

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minorities reside." 1975 S. Rep., *supra* note 5, at 8.

[11] During the 1976 Term, the Supreme Court issued opinions in four Voting Rights Act cases, Briscoe v. Bell, 97 S. Ct. 2428 (1977); Morris v. Gressette, 97 S. Ct. 2411 (1977); United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977); United States v. Board of Supervisors, 429 U.S. 642 (1977), summarily affirmed another, United States v. County Comm'n, 425 F. Supp. 433 (S.D. Ala. 1976), *aff'd*, 430 U.S. 924 (1977), and noted probable jurisdiction in another, United States v. Board of Comm'rs, 430 F. Supp. 786 (N.D. Ala. 1976), *prob. juris. noted*, 97 S. Ct. 2970 (1977) (No. 76-1662).

[12] *E.g.*, Beer v. United States, 425 U.S. 130, 141 (1976), which defines dilution in such a manner that *any* increase in minority voting rights affected by a proposed change to voting procedures brings the change into compliance with the Act. See notes 50 through 58 and accompanying text *infra*.

[13] *E.g.*, 42 U.S.C. § 1973c (Supp. V 1975) (suspension of literacy tests); *id.* § 1973d (appointment of federal elections examiners); *id.* § 1973h (authorizing Attorney General to contest use of poll taxes as discriminatory under the Act); *id.* § 1973i (prohibited acts); *id.* § 1973aa-1 (1970) (residence requirements for presidential elections); *id.* § 1973aa-1a (Supp. V 1975) (bilingual election requirements).

[14] 42 U.S.C. § 1973c (Supp. V 1975). In its most recent form, § 5 provides in part:

> Whenever a State or political subdivision . . . shall enact or seek to administer any [covered] voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on [the applicable date], such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indica-

rages[15] over the equity of section 5 which, with its companion section 4,[16] has become the quintessence of the Act itself.[17] By specifying the conditions which will bring section 5 to bear on a given locality, section 4 performs as the triggering mechanism of the Act.[18] Section 5, the "preclearance" section, requires political subdivisions of any state caught in the section 4 net to seek approval prior to implementing changes to "any voting qualifications or prerequisite to voting, or standard, practice or procedure with respect to voting."[19] Preclearance may be obtained by seeking a declaratory judgment from a three-judge district court in the District of Columbia or by submitting the proposal to the Attorney General for approval in the form of a failure to object to the change within sixty days of submission.[20]

The constitutionality of the Voting Rights Act was established in

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tion by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

[15] The ire of southern legislators has been directed at the operative effect of §§ 4 and 5. *E.g., 1975 Hearings*, *supra* note 4, at 23, 27 (remarks of Sen. Allen) ("radical departures from traditional constitutional principles"); 1975 S. REP., *supra* note 5, at 73-74 (minority views) ("double standard and contrary to general Federal law"); 1965 H.R. REP., *supra* note 9, at 84 (minority views) ("questionable constitutionality and unquestioned harshness").

[16] 42 U.S.C. § 1973b (Supp. V 1975).

[17] COMMISSION REPORT, *supra* note 6, at 25; Note, *"Discriminatory Purpose," "Changes," and "Dilution": Recent Judicial Interpretations of § 5 of the Voting Rights Act*, 51 NOTRE DAME LAW. 333, 334 (1975).

[18] 42 U.S.C. § 1973b(b) (Supp. V 1975). Section 4 is triggered when a state's use of a test or device coincides with a finding that less than 50% of the voting age population of the state either were registered or voted in the previous presidential election. The original provisions pointedly applied to six southern states which imposed voter qualifications on racial minorities but have since been expanded to cover discrimination against language minorities, *id.* § 1973b(f).

[19] *Id.* § 1973c.

[20] *Id.* Rather than intending to open a deluge of cases upon the District of Columbia Circuit, the relatively simple and quick procedures available through the Attorney General were meant to favor the latter approach. During the years 1965 to 1974, the Department of Justice received 4,476 proposals for voting-related changes. *1975 Hearings*, *supra* note 4, at 597. An additional 304 proposals for changes were submitted during the first four and one-half months of 1975. *Id.* at 716.

South Carolina v. Katzenback,[21] where the Supreme Court considered each aspect of the Act and specifically approved section 5's "uncommon exercise of congressional power":[22]

> Congress knew that some of the States covered by § 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.[23]

Nevertheless, the Court did not breathe life into section 5 until its holding in *Allen v. State Board of Elections*[24] that the section covers various types of voting changes including changing elective offices to appointive ones, switching from district to at-large voting schemes, implementing new qualifications for candidates and changing write-in ballot procedures.[25] More important, however, the Court also announced significant procedural points: (1) private parties have standing to sue for injunctive relief against violations of section 5;[26] (2) the United States District Court for the District of Columbia has exclusive judicial jurisdiction to determine whether a particular change is discriminatory and to issue preclearance;[27] (3) local district courts have jurisdiction

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[21] 383 U.S. 301 (1966).

[22] *Id.* at 334.

[23] *Id.* (citations and footnotes omitted). Justice Black dissented from the grant of constitutionality to § 5 on two grounds. First, seeking preclearance from the courts amounted to a request for an advisory opinion. "[I]t is hard for me to believe that a justiciable controversy can arise in the constitutional sense from a desire by the United States Government . . . to determine in advance what legislative provisions a State may enact or what constitutional amendments it may adopt." *Id.* at 357 (Black, J., concurring in part and dissenting in part). Second, § 5 appeared to be an improper congressional restraint on the powers reserved to the states. "I cannot help but believe that the inevitable effect of any such law [creates] the impression that the . . . States treated in this way are little more than conquered provinces." *Id.* at 359-60. The question of constitutionality has evoked more discussion than any other single aspect of the Act. *See generally* Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1 (1965); Cox, *Constitutionality of the Proposed Voting Rights Act of 1965*, 3 HOUS. L. REV. 1 (1965); Rice, *The Voting Rights Act of 1965: Some Dissenting Observations*, 15 KAN. L. REV. 159 (1966); 80 HARV. L. REV. 124 (1966); 18 S.C.L. REV. 535 (1966); 41 ST. JOHN'S L. REV. 270 (1966); 18 SYRACUSE L. REV. 104 (1966); 40 TUL. L. REV. 487 (1966); 8 WM. & MARY L. REV. 169 (1966). The Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315 (codified at 42 U.S.C. §§ 1973 to 1973bb-4 (1970)), were found constitutional in Oregon v. Mitchell, 400 U.S. 112 (1970).

[24] 393 U.S. 544 (1969).

[25] *Id.* at 563-71.

[26] *Id.* at 554-57. See text accompanying note 141 *infra*.

[27] 393 U.S. at 558-59. See text accompanying notes 144 & 146 *infra*.

only to determine whether a change is subject to section 5;[28] and (4) these local district courts must also be composed of three judges.[29] *Allen* left no reasonable doubt that section 5 applies to all voting changes,[30] and subsequent challenges to the inclusiveness of the Act have been rejected.[31]

The decisions in *Katzenback* and *Allen*, however, concerned the constitutionality and breadth of the Act rather than whether a particular voting change was unlawful.[32] As discussed below, the Supreme Court's subsequent decisions relating to particular violations have not utilized the broad, flexible rationales previously employed to determine the Act's scope.

In *City of Richmond v. United States*[33] the city sought approval of a proposed annexation from the District of Columbia district court. Prior to submission of its plan, the city had taken cognizance of that court's opinion in *City of Petersburg v. United States*[34] to the effect that any voting inequities inherent in Petersburg's annexation plan could be remedied by changing from an at-large system for electing officials to a ward plan.[35] Richmond's submission therefore included such a change as compensation for the fact that the annexation would reduce the city's black population from a 52% majority to 42%.[36] The district court, how-

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[28] 393 U.S. at 558-59. See text accompanying notes 145 through 147 *infra*.

[29] 393 U.S. at 560-63. See text accompanying notes 143 through 148 *infra*.

[30] "It is significant that Congress chose not to include even . . . minor exceptions in § 5, thus indicating an intention that all changes, no matter how small, be subjected to § 5 scrutiny." 393 U.S. at 568.

[31] Georgia v. United States, 411 U.S. 526, 534-35 (1973) (§ 5 applied to legislative reapportionments); Perkins v. Matthews, 400 U.S. 379, 394-95 (1971) (coverage extended to annexations and changes in polling locations). The challenges have continued. *See* Dougherty County Bd. of Educ. v. White, No. 76-29-ALB (M.D. Ga. April 27, 1977) (three-judge court), *appeal docketed*, 46 U.S.L.W. 3025 (U.S. July 21, 1977) (No. 77-120) (question of whether school board rule requiring board employees to resign upon registering candidacy for elective political office is covered).

[32] In Beer v. United States, 425 U.S. 130 (1976), Justice Marshall noted in dissent: "While we have settled the contours of § 5's jurisdiction, however, we have yet to devote much attention to defining § 5's substantive force within those bounds." *Id.* at 145 (Marshall, J., dissenting).

[33] 422 U.S. 358 (1975).

[34] 354 F. Supp. 1021 (D.D.C. 1972) (three-judge court) (per curiam), *aff'd mem.*, 410 U.S. 962 (1973).

[35] 354 F. Supp. at 1031. Additionally, the *City of Petersburg* court held that the state or other political subdivision bringing a § 5 action has the burden proving that the proposed change is not discriminatory. *Id.* at 1027-29. *See also* South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966) ("There [is] nothing inappropriate about . . . putting the burden of proof on the areas seeking [approval of their proposals].").

[36] Blacks were given substantial majorities in four of the nine new wards. The Attorney General had agreed to a consent judgment approving the plan but an intervenor had opposed it. 422 U.S. at 366.

ever, found invidious purpose and effect and declared the annexation unenforceable under section 5.[37] In its first opinion treating the merits of a section 5 case, the Supreme Court reversed and remanded.[38]

The Court first inspected the discriminatory effect of the annexation, reasoning that even though "it would be difficult to conceive of any annexation that would not change a city's racial composition,"[39] annexations were not automatically discriminatory. Consequently, it was only a short step to the conclusion that possible discriminatory effects of an annexation are necessarily gauged in the abstract and not in relation to the preannexation situation.[40] The change to a ward system was thus sufficient justification for the annexation. The other side of the purpose-effect sword produced an equally startling result. Even after accepting a special master's conclusion that the annexation was undertaken for a discriminatory purpose,[41] the Court concluded that section 5 was not violated if on remand the city could produce acceptable after-the-fact reasons for its changes.[42]

This ex post facto handling of the case is questionable on several counts. First, the Voting Rights Act warns that either discriminatory purpose or effect[43] is sufficient to invalidate a voting change under section 5. It is an inescapable fact that both the purpose and the effect of Richmond's plan were discriminatory.[44] Second, the Court overlooked the remedial purposes of section 5 by resorting to postannexation criteria as a basis for its judgment.[45] Third, by judging effect without

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[37] City of Richmond v. United States, 376 F. Supp. 1345, 1349-57 (D.D.C. 1974), *rev'd*, 422 U.S. 358 (1975).

[38] *City of Petersburg* presented a substantially similar situation but the Court disposed of the case with a summary affirmance. City of Petersburg v. United States, 410 U.S. 962 (1973), *aff'g mem.* 354 F. Supp. 1021 (D.D.C. 1972).

[39] 422 U.S. at 368.

[40] "In our view, [the Richmond] plan does not undervalue the black strength in the community *after annexation* . . . ." *Id.* at 372 (emphasis added). If it is decided that the change from at-large to wards is required to reduce the discriminatory effects of the annexation, then the only question is the extent of the ameliorative effect.

[41] *Id.*

[42] *Id.* at 378-79.

[43] 42 U.S.C. § 1973c (Supp. V 1975) ("does not have the purpose and will not have the effect . . . .").

[44] 422 U.S. at 382 (Brennan, J., dissenting) ("flagrantly discriminatory purpose"); *see id.* at 386 ("dilutive effect of Richmond's annexation is clear").

[45] "The reliance upon postannexation fairness of representation is inconsistent with what I take to be the fundamental objective of § 5, namely, the protection of *present* levels of voting effectiveness for the black population." *Id.* at 388 (Brennan, J., dissenting). The statement returned to haunt Justices Brennan and Marshall, when the latter argued for imposition of *constitutional* standards under § 5 rather than reliance on present levels in Beer v. United States, 425 U.S. 130, 141 n.5, 145-63 (1976). See notes 50 through 58 and accompanying text *infra*.

regard to preannexation minority voting strength, the opinion places purpose on too high a plane, affording less significance to effect if the purpose hurdle is successfully cleared.[46] Holding purpose above effect in this manner denies the clear language of the statute.[47] At most the Court's bifurcated standard is justifiably applied only when a proposed change is so necessary or advantageous that it overwhelms any abridgement or dilution which cannot otherwise be overcome.[48] The overtly discriminatory purposes without redeeming factors found in the trial record,[49] however, cause the Richmond annexation to fall below such a standard.

In the next major voting rights case to come before the Court, *Beer v. United States*,[50] the questions to be resolved were the meaning of the word "abridgement" as used in section 5 and the underlying conflict between statutory and constitutional voting rights.[51] The case involved a New Orleans reapportionment scheme under which black voting strength would be increased from a population majority in one of five districts to population majorities in two districts and a voting majority in another.[52] The District of Columbia district court had denied a preclearance declaratory judgment on the ground that the plan failed to

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[46] *See* Beer v. United States, 425 U.S. 130 (1976) (Marshall, J., dissenting), in which Justice Marshall details the possible ways of interpreting purpose and/or effect. He concluded that in fifteenth amendment cases "legislative purpose alone is determinative, although language in [the] cases may be isolated that seems to approve some inquiry into effect insofar as it elucidates purpose." *Id.* at 148 n.4. *Richmond* is cited for the proposition "that bad purpose may invalidate a law under the Fifteenth Amendment even if there is *no unconstitutional effect at all*." *Id.* (emphasis added).

[47] See notes 14 & 43 and accompanying text *supra*.

[48] [W]here the racial composition of an annexed area is substantially different from that of the annexing area, it may well be impossible to protect preannexation black voting strength without invidiously diluting the voting strengths of other racial groups in the community.

422 U.S. at 388 (Brennan, J., dissenting).

[49] 422 U.S. at 372.

[50] 425 U.S. 130 (1976).

[51] Specifically, the question was whether § 5 is violated when a political entity covered by the section implements a voting change which increases minority representation but to less than a claimed constitutional level. Justice Stewart, for the majority, commented: "In evaluating this issue it is important to note at the outset that the question is not one of constitutional law, but of statutory construction." *Id.* at 139. Justice Marshall disagreed. "All the purposes of the statute are met, however, by the inquiry § 5's language plainly contemplates: whether, in absolute terms, the covered jurisdiction can show that its proposed plan meets the constitutional standard." *Id.* at 153 (Marshall, J., dissenting). The lower courts have already noted the distinction. *E.g.*, Kirksey v. Board of Supervisors, 554 F.2d 139, 143 n.9 (5th Cir. 1977) (en banc), *petition for cert. filed*, 46 U.S.L.W. 3243 (U.S. Sept. 30, 1977) (No. 77-499).

[52] 425 U.S. at 135-36.

give blacks their proportional voting strength.[53] After a brief review of the legislative history and the facts, the Supreme Court announced its major holding in the case, the nonretrogression rule: "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral process."[54] Applying the rule to the facts at hand produced an easily predictable outcome—no section 5 abridgement in the New Orleans plan. Furthermore, if there is no abridgement under this rule, section 5 cannot be violated unless a proposed change "so discriminates on the basis of race or color as to violate the Constitution."[55]

Justice Marshall's dissent took issue most strongly with the Court's last conclusion, arguing that the constitutional test should not be inferior to the statutory nonretrogression test. Instead, the two should be equated since a proposal which does not meet constitutional standards also violates the intent of section 5.[56] A combination of the constitutional standard and the shifted burden of proof inherent in section 5[57] produces Justice Marshall's version of the proper test to be applied in voting rights cases:

> [T]he burden is on the covered jurisdiction to show that 'the political processes leading to nomination and election were . . . equally open to participation by the group in question' [or to demonstrate] compelling reasons for [the plan's] adoption.[58]

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[53] *Id.* at 136-37. No blacks had been elected to the council between 1960 and 1970 as they had neither voting nor population majorities in any district under the existing plan. On a proportional basis by registered voters, blacks could have elected 2.42 of the city's seven council members and by voting age population 3.14 members. Under the proposed redistricting, "the District Court concluded that, since New Orleans' elections had been marked by bloc voting along racial lines, Negroes would probably be able to elect only one councilman—the candidate from the one councilmanic district in which a majority of the voters were Negroes." *Id.* In a footnote, the Court reiterated that it had "rejected the proposition that members of a minority group have a federal right to be represented in legislative bodies in proportion to their number in the general population." *Id.* at 136 n.8, *citing* Whitcomb v. Chavis, 403 U.S. 125, 149 (1971).

[54] 425 U.S. at 141.

[55] *Id.*

[56] *Id.* at 146-52 (Marshall, J., dissenting).

[57] *Id.* at 157-58.

[58] *Id.* at 142 n.14, *quoting* White v. Regester, 412 U.S. 755, 765-66 (1973).

The majority and dissent were also at odds over whether there was an actual unconstitutional dilution. "The United States has made no claim that [the proposal] suffers from [a constitutional] disability, nor could it rationally do so." 425 U.S. at 155. The dissent, however, found the requisite dilution. *Id.* at 158-63 (Marshall, J., dissenting). It has been suggested that the Court's statement that the government had failed to make a claim of unconstitutional dilution, coupled with the omission of any statement on burden of proof, imperils the strongest feature of § 5. 60 MARQ. L. REV. 173, 183-84 (1976).

II. Recent Issues

A. Racial Considerations

In *United Jewish Organizations of Williamsburgh, Inc. v. Carey*,[59] the Supreme Court split four different ways[60] in affirming a Second Circuit decision[61] ostensibly holding that a state may consider racial criteria in complying with the requirements of the Voting Rights Act. The controversy grew out of the 1970 amendments to the Act which extended section 5's coverage to include three New York counties.[62] When legislative and congressional districts were reapportioned in accord with the results of the state's 1970 census,[63] the Attorney General interposed a section 5 objection. The reapportionment committee subsequently contacted the Justice Department to ascertain the requirements for approval of the plan.[64] The response led the committee to believe that a plan establishing more districts with "substantial nonwhite majorities" of at least 65% would satisfy the Attorney General.[65] Accordingly, new state senate, assembly and congressional districts were drawn. In all prior apportionments Williamsburg's Hasidic community[66] had been situated in a single election district. The proposed redistricting, however, split the community between two districts with nonwhite[67] majorities, leaving the Hasidim as a minority in each. Against this background, the Hasidim challenged the constitutionality of the reapportionment on equal protection and due process grounds.[68] The district

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[59] 430 U.S. 144 (1977).

[60] Justices White, Stewart, Brennan and Chief Justice Burger delivered opinions. Justice White's opinion was joined by Justices Stevens in its entirety, Brennan and Blackmun in all but the constitutional issues, and Rehnquist in all but the nonconstitutional issues. Justice Powell joined Justice Stewart's concurrence, Justice Brennan separately explained his limited concurrence, and the Chief Justice dissented. Justice Marshall did not participate.

[61] United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 F.2d 512 (2d Cir. 1975), *aff'd sub nom.*, United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

[62] 430 U.S. at 149.

[63] *See* N.Y. Const. art. III, § 4 (mandating periodic reapportionment).

[64] 430 U.S. at 149-50.

[65] *Id.* at 152. "A staff member of the legislative reapportionment committee testified that in the course of meetings and telephone conversations with Justice Department officials, he 'got the feeling . . . that 65 percent would be probably an approved figure' . . . ." *Id.*

[66] Plaintiffs were members and organizations composed of members of a sect devoted to strict observance of Jewish ritual. Approximately 30,000 Hasidim resided in Williamsburgh. *Id.*

[67] The Court used "the term 'nonwhite' to refer to blacks and Puerto Ricans, although small numbers of other nonwhite groups (such as orientals) are also included in the nonwhite population statistics." 430 U.S. at 150 n.5.

[68] United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 377 F. Supp. 1164

court dismissed the suit, holding that the reapportionment was a valid action not subject to contest under section 5 and that there is no right to community representation or identity.[69] On appeal, the court limited the issue by noting a lack of proof of "invidious"[70] discrimination against whites and considered only the plaintiff's argument that using racial considerations to determine voting districts is per se unconstitutional.[71] Additionally, the decision was limited to its facts by the ultimate holding that use of racial considerations under the direction of the Attorney General, in compliance with the Voting Rights Act and absent proof of "unfair" prejudice to any parties is not unconstitutional.[72]

Before the Supreme Court, the petitioners asserted four propositions for review.

> *[F]irst,* that whatever might be true in other contexts, the use of racial criteria in districting and apportionment is never permissible; *second,* that even if racial considerations may be used to redraw district lines in order to remedy the residual effects of past unconstitutional reapportionments, there are no findings here of prior discriminations that would require or justify as a remedy that white voters be reassigned in order to increase the size of black majorities in certain districts; *third,* that the use of a "racial quota" in redistricting is never acceptable; and *fourth,* that even if the foregoing general propositions [were] infirm, what New York actually did in this case was unconstitutional, particularly its use of 65% nonwhite racial quota for certain districts.[73]

Justice White authored the major opinion which treated the first three claims separately from the constitutional question posed by the fourth. In addressing the nonconstitutional issues, Justice White reconciled the Court's affirmance in the instant case with the *Richmond* and *Beer* decisions by stating that the two cases implicitly stand for

> the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to insure that its reapportionment plan complies with § 5.[74]

(E.D.N.Y. 1974), *aff'd,* 510 F.2d 512 (2d Cir. 1975), *aff'd sub nom.*, United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

[69] 377 F. Supp. at 1165-66.

[70] The court's use of the term "invidiously to cancel out or minimize . . . voting strength," 510 F.2d at 523, followed White v. Regester, 412 U.S. 755, 765 (1973).

[71] 510 F.2d at 523.

[72] *Id.* at 524-25. The shift from "invidious" to "unfair" is unexplained.

[73] 430 U.S. at 156 (emphasis added).

[74] *Id.* at 161. The case has already been followed on this point. Kirksey v. Board of Supervisors, 554 F.2d 139, 151 (5th Cir. 1977) (en banc), *petition for cert. filed,* 46 U.S.L.W. 3243 (U.S. Sept. 30, 1977) (No. 77-499).

He justified this conclusion by noting that *Beer*'s nonretrogression test called for references to statistics concerning racial minorities and that *Richmond* had relied on the postannexation reapportionment plan which sought to restore some black voting power.[75] This explanation, of course, permitted swift rejection of each of the petitioners' first three challenges.[76]

Proceeding to the fourth proposition, two separate grounds were advanced for denying the constitutional claim. The first, concurred in by the same Justices who had agreed with the rejection of the three statutory propositions,[77] was based on the petitioners' failure to offer proof that the state had done anything more than comply with the *Beer* retrogression principle.[78] Justice White devised a standard of proof based on *Beer* which required evidence that the new plan increased nonwhite voting strength beyond that obtained under the previous plan. He then concluded that without such proof it would be assumed that New York had simply maintained previous nonwhite voting levels as required by the Act.[79]

Under the second rationale, Justice White also found that there were no discernible fourteenth or fifteenth amendment violations present. However, because the opinion purports to be an independent finding of constitutionality for New York's action, this segment was joined only by Justices Stevens and Rehnquist. Specifically, the question was whether members of the Williamsburg Jewish community had a constitutional right to representation. Adhering to precedent,[80] Justice White concluded that there is no such right and, relying specifically on *Gaffney v. Cummings*,[81] reiterated the principle that it is within a state's constitutional authority to take into account racial or political considerations in reapportionment.[82]

Justice White's first line of reasoning with regard to the fourth proposition is strained and, as is so often the case when an attempt is made to argue a foregone conclusion, is supported by few facts and is oblivious to inconsistencies in its logic. Chief Justice Burger, for example, contended in his dissent that regardless of their ultimate validity such conclusions could not be supported by the facts in the "sparse

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[75] 430 U.S. at 159-60.

[76] *Id.*

[77] *Id.* at 156. See note 60 *supra*.

[78] 430 U.S. at 162-63.

[79] *Id.*

[80] *Id.* at 166, *citing* Whitcomb v. Chavis, 403 U.S. 124, 153-60 (1971) (discrimination not proved by disproportionate representation).

[81] 412 U.S. 735 (1973).

[82] *Id.* at 751-54.

record" before the Court and argued that a remand was necessary.[83] Furthermore, the plurality's insistence that New York was actively attempting to comply with *Beer* ignores, even though it acknowledges, the fact that *Beer* was decided after the trial court's dismissal of the instant case and the subsequent affirmance.[84] Similarly, even though the opinion readily imputes motives to New York's acts, it fails to indulge in the equally logical assumption that nonwhite voting strength was in fact increased by the plan. The logic behind requiring the petitioners to prove an increase[85] appears spurious since the manipulations employed by state officials to reach the final apportionment make it almost statistically impossible that the relative voting strengths remained the same. Indeed, had minority voting strength been decreased, section 5 preclearance could not have been granted and the suit would not have been necessary.

Justice Brennan joined Justice White's opinion in all but the second rationale for denying the constitutional claim, noting that "this case carries [the Court] further down the road of race-centered remedial devices than [it has] heretofore traveled."[86] Thus fatigued from the journey, he was "wholly content to leave this thorny [constitutional] question [of "reverse discrimination"] until another day."[87] Yet despite this procrastination, Justice Brennan did assert that the Voting Rights Act requires race consciousness in achieving its purposes.[88] Magnifying further the divisions between the members of the Court on the constitutional issue, Justices Stewart and Powell, though concurring in the judgment, preferred to hold only that the petitioners had failed to prove their fourteenth and fifteenth amendment claims.[89] Finally, Chief Justice Burger, dissenting, argued that while the use of racial criteria may not be unconstitutional per se, such standards would fail to the extent that they infringed on the Hasidim's rights. Thus, although the petitioners had no right to representation as an ethnic group, they did have a "constitutional right not to be carved up so as to create a voting bloc

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[83] 430 U.S. at 184-85 (Burger, C.J., dissenting). Justice White does note, however, that petitioners elected to stand on their pleadings. *Id.* at 163 n.21.

[84] *Id.* at 163 & n.21.

[85] *Id.*

> [T]here is no evidence in the record to show whether the 1972 plan increased or decreased the number of senate or assembly districts with substantial nonwhite majorities of 65%. For all that petitioners have alleged or proved, the 1974 revisions have accomplished nothing more than the restoration of nonwhite voting strength to 1966 levels.

Id. (footnote omitted).

[86] *Id.* at 169 (Brennan, J., concurring in part).

[87] *Id.* at 171.

[88] *Id.* at 175.

[89] *Id.* at 179-80 (Stewart, J., concurring).

composed of some other ethnic or racial group."[90]

At best, *United Jewish Organizations* presents an enigma. While the petitioners dwelt mainly on the permissibility of redistricting to benefit one group at the disadvantage of another,[91] the Court framed most of its judgment within the strict confines of the section 5 procedural setting.[92] By doing so, the preclearance requirements of the Voting Rights Act are translated for the first time into an explicit affirmative order to produce constitutional voting plans, a change from the prior unspoken but understood directive.[93] Beyond this, however, the case alters little of substance with regard to section 5 and it is reasonable to speculate that the case will rarely be cited as the single predicate for actions brought under the Act. The case's significance will likely be limited to questions of affirmative action, whether statutory or constitutional, until more definitive guidance is provided by the Court.

Indeed, it is odd that the Justices produced such extensive opinions in an area heretofore untouched when a summary affirmance or denial of certiorari would have sufficed. There are obviously strong and varied opinions on the subject within the Court[94] and one of the most difficult tasks will be separating these issues from the strict Voting Rights Act question.[95] And, despite the fact that the judgment can be limited to the

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[90] *Id.* at 186 (Burger, C.J., dissenting).

[91] *See* note 73 *supra* (petitioners' claims); Petition for Certiorari 10-16, United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977) (reasons that writ of certiorari should be granted); Petitioner's Brief 24-58, United Jewish Organizations of Williamsburgh, Inc., v. Carey, 430 U.S. 144 (1977) (argument based primarily on issue of discrimination; only passing reference to § 5 and cases thereunder).

[92] See notes 73 through 76 and accompanying text *supra*.

[93] *Implicit* in *Beer* and *City of Richmond* . . . is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment complies with § 5.

430 U.S. at 161.

[94] This may well be only the Court's first tentative venture into an area frought with emotional issues and heretofore bypassed for the most part. *See generally* Regents of the Univ. of Cal. v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976) (claim of reverse discrimination by white medical school applicant), *cert. granted,* 429 U.S. 1090 (1977) (No. 76-811). Certiorari in *Bakke* was granted less than a week before the *United Jewish Organizations* opinions were delivered. "Judged by the cases that lie ahead, [*United Jewish Organizations*] was easy . . . . [a]nd we are not about to guess how the Justices will regard [*Bakke*]." Washington Post, March 4, 1977, at A22, col. 1.

[95] *Compare* United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 175 (1977) (Brennan, J., concurring in part) ("I am convinced that the application of the Voting Rights Act substantially minimizes the objection to preferential treatment and legitimates the use of even overt, numerical racial devices in electoral redistricting.") *with* Kirksey v. Board of Supervisors, 554 F.2d 139, 161 (5th Cir. 1977) (en banc) (Hill, J., dissenting) (addressing the constitutional voting rights issue and citing *United Jewish Organizations*), *petition for cert. filed,* 46 U.S.L.W. 3243 (U.S. Sept. 30, 1977) (No. 77-499).

statutory context of the Act, the question of whether racial considerations may be used or must be used remains unresolved.[96]

B. *Reviewability*

In *Morris v. Gressette*,[97] one of the last decisions rendered in the 1976 Term, the Court considered the limited issue of whether the Attorney General's preclearance decisions under section 5 are judicially reviewable. The *Morris* controversy arose from the Attorney General's deferral to a local district court's determination that a proposed South Carolina reapportionment was constitutional[98] and failed to interpose an objection. Shortly after the expiration of the sixty-day objection period specified in section 5, private plaintiffs initiated an action in the district court for the District of Columbia challenging the Attorney General's failure to object. The court ruled that review by the Attorney General is mandatory.[99] The ensuing order resulted in an objection by the Justice Department to the proposed reapportionment and the court of appeals affirmed.[100] Subsequently, plaintiffs in the District of Columbia action brought suit in the district court for South Carolina to enjoin implementation of the reapportionment, and a three-judge court was convened.[101]

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[96] Kirksey v. Board of Supervisors, 554 F.2d 139, 161 (5th Cir. 1977) (en banc) (Hill, J., dissenting), *petition for cert. filed*, 46 U.S.L.W. 3243 (U.S. Sept. 30, 1977) (No. 77-499). *Kirksey*, the only case to date significantly construing *United Jewish Organizations*, fortuitously offered the en banc Fifth Circuit a chance to display a wide range of opinions. Judge Hill also raises another interesting question: Should *United Jewish Organizations* apply in cases involving court-ordered voting changes? *Kirksey* implies that it does. 554 F.2d at 161.

[97] 97 S. Ct. 2411 (1977). A related case, Briscoe v. Bell, 97 S. Ct. 2428, 2433 (1977), held that decisions by the Attorney General and the Director of the Census pursuant to § 4 are not reviewable. Justice Marshall, who dissented in *Morris*, wrote the Court's opinion in *Briscoe*.

[98] Twiggs v. West, Civil No. 71-1106 (D.S.C., April 7, 1972) (three-judge court), *aff'd mem. sub nom.*, Powell v. West, 413 U.S. 901 (1973).

[99] Harper v. Kleindienst, 362 F. Supp. 742, 745-46 (D.D.C. 1973), *aff'd sub. nom.*, Harper v. Levi, 520 F.2d 53 (D.C. Cir. 1975), *disapproved in* Morris v. Gressette, 97 S. Ct. 2411 (1977).

[100] Harper v. Levi, 520 F.2d 53 (D.C. Cir. 1975), *disapproved in* Morris v. Gressette, 97 S. Ct. 2411 (1977).

[101] Morris v. Gressette, 425 F. Supp. 331 (D.S.C. 1976), *aff'd*, 97 S. Ct. 2411 (1977). The reasons for convening a three-judge court are not clear. See section III. *B. infra*. The statutory requirement that "[a]ny action under this section shall be heard and determined by a court of three judges," 42 U.S.C. § 1973c (Supp. V 1975), was construed in Allen v. State Bd. of Elections, 393 U.S. 544, 560-62 (1969), as applying to three situations. See text accompanying note 126 *infra*. One of these situations is where an individual sues for a determination that a change is covered by § 5, but the only substantive issues in such a case are § 5 coverage and preclearance vel non. Perkins v. Matthews, 400 U.S. 379, 383 (1971) ("The inquiry should [be] limited to the determination whether 'a state requirement is covered by § 5 but has not been subjected to the required federal scrutiny.' "). Preclearance itself is seldom in contention. *But see* notes 199 through 203 and

After that court held that the Attorney General's failure to object was not reviewable, the Supreme Court agreed to hear the case on direct appeal.[102] The Court's investigation centered on section 5's preclearance provisions[103] in light of the Administrative Procedure Act (APA)[104] which authorizes judicial review of governmental actions except where precluded by statute.[105] An earlier case construing the APA, *Barlow v. Collins*,[106] had expanded the concept of statutory prohibition against review to include an implied restriction.[107] Acknowledging that section 5 contained no express bar to review, the Court was required to search for an implied one. Such a restriction was found in section 5's purpose of providing a speedy alternative to judicial preclearance, and "[s]ince judicial review of the Attorney General's actions would unavoidably extend [the preclearance] period, it is necessarily precluded."[108]

Justice Marshall's dissent, however, seems to make the better argument. First, referring to a more recent APA case, he concluded that although a ban against review may be implied, there is still a "heavy burden of overcoming a strong presumption that Congress did not mean to prohibit . . . judicial review."[109] Furthermore, this presumption is strengthened by section 4's specific language denying review. If the drafters had intended that decisions under section 5 be accorded the same respect, they need only have used similar wording.[110] Another basic con-

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accompanying text *infra*. An injunction will automatically issue if the change is covered but not precleared. See note 150 *infra*. If coverage or preclearance are not at issue in an individual's suit under § 5, a three-judge court is not required. *See* Harper v. Levi, 520 F.2d 53, 61-64 (D.C. Cir. 1975) (single-judge court properly heard question of reviewability), *disapproved on other grounds in* Morris v. Gressette, 97 S. Ct. 2411 (1977); Bond v. White, 508 F.2d 1397, 1400 (5th Cir. 1975) (three-judge court can properly remand case to single judge for determination of ancillary matters); Harris v. Levi, 416 F. Supp. 208, 211 (D.D.C. 1976) (three-judge court not required to review Attorney General's withdrawal of objection); Yelverton v. Driggers, 370 F. Supp. 612, 614 n.3 (M.D. Ala. 1974) (three-judge court not required for determinations on questions of local law). Coverage was not at issue in *Morris* since "all parties [conceded] that the challenged legislation is within the coverage of . . . § 5." 425 F. Supp. at 333. Consequently, the jurisdiction of both the three-judge district court and the Supreme Court is questionable. *See generally* Allen v. State Bd. of Elections, 393 U.S. 544, 560-62 (1969).

[102] Morris v. Gressette, 97 S. Ct. 2411 (1977).

[103] *Id.* at 2418.

[104] 5 U.S.C. §§ 702-706 (1970).

[105] Review is also precluded where agency action is discretionary. *Id.* § 701a.

[106] 397 U.S. 159 (1970).

[107] *Id.* at 165.

[108] 97 S. Ct. at 2420-21.

[109] *Id.* at 2423 (Marshall, J., dissenting), *quoting* Dunlap v. Bachowski, 421 U.S. 560, 567 (1975).

[110] 97 S. Ct. at 2423. *Contra,* Harris v. Levi, 416 F. Supp. 211, 216 (D.D.C. 1976) (§ 4 must expressly preclude review because no other procedures are set out; § 5 impliedly denied APA review because it expressly provides an alternative in the courts). *See*

flict between the majority and dissenting opinions revolves around the nature of the Attorney General's deference to the district court's holding of constitutionality. The majority viewed the inaction as an affirmative approval under section 5[111] while the dissent considered the deferral an abdication of responsibility.[112] That the Attorney General, when forced to either approve or object, found the plan to be an abridgment of voting rights would appear to be dispositive of the point. Finally, Justice Marshall touches on one last incongruity. The Court's previous decision in *Georgia v. United States*[113] had reviewed the propriety of the Attorney General's objection in that case. Seemingly, "the law now allows review of the Attorney General's decision to object . . . but does not allow review of his *failure* to object."[114]

While Justice Marshall's dissent[115] considered the immediate effects of the decision, the *Harper v. Levi*[116] opinion which precipitated the entire issue addressed the more far-reaching effects of the majority's rationale. It noted that Congress intended that however the preclearance be effected, it should emanate from the District of Columbia. But, "[t]o the extent that the Attorney General accords [undeviating deference] to local [courts], the congressional goal of decisional uniformity may be frustrated."[117]

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generally Briscoe v. Bell, 97 S. Ct. 2428 (1977).

[111] "The record is clear that the Attorney General reviewed the submitted legislation as well as the judicial determination in *Twiggs v. West* . . . and *decided* not to interpose an objection . . . ." 97 S. Ct. at 2422 n.24.

[112] "It was . . . his duty to object to implementation of that legislation. He did not perform that duty, deferring instead to a district court judgment . . . ." *Id.* at 2425-26 (footnotes omitted).

[113] 411 U.S. 526 (1973).

[114] 97 S. Ct. at 2426-27 (emphasis added) (footnotes omitted). This review of an objection is in addition to the state's further action for a declaratory judgment in the District of Columbia district court. *Id.* at 2421 n.21.

[115] Justice Blackmun also dissented, citing the majority opinion in Harper v. Levi, 520 F.2d 53, 64-73 (D.C. Cir. 1975), *disapproved in* Morris v. Gressette, 97 S. Ct. 2411, (1977), for his assertions that (1) § 1973c contains no specific denial of review; (2) the Attorney General's guidelines, 28 C.F.R. §§ 51.1- .29 (1976), remove all discretion; and (3) "undeviating deference" to a court opinion gives the power of approval to a tribunal not intended by Congress.

[116] 520 F.2d 53 (D.C. Cir. 1975), *disapproved in* Morris v. Gressette, 97 S. Ct. 2411 (1977).

[117] *Id.* at 72. Under *Morris,* a favorable conclusion by a local three-judge court that a proposed voting plan is constitutional will be conclusive on the § 5 preclearance issue upon submission to the Justice Department. That such a favorable holding is possible is demonstrated by Twiggs v. West, No. 71-1106 (D.S.C. April 7, 1972) (three-judge court), *aff'd mem. sub nom.*, Powell v. West, 413 U.S. 901 (1973), and the various three-judge court decisions in the *Connor* line of cases, *e.g.*, Connor v. Waller, 396 F. Supp. 1308 (S.D. Miss. 1975); Connor v. Johnson, 330 F. Supp. 506 (S.D. Miss. 1971). See note 125 and accompanying text *infra*. Such suits are often prompted by an attempt to implement the new

III. Ancillary Issues, Lower Court Decisions and Agency Regulations

In the twelve years since the Voting Rights Act was passed, decisions interpreting the various alternatives opened or foreclosed by the Act have been limited in number. It is only since *Allen v. State Board of Elections*[118] and *Perkins v. Matthews*[119] that section 5 has become the critical key to the Act which it is today.[120] Only more recently have guidelines been promulgated and theories advanced which solidify the issues on the periphery of the Act and section 5 in particular.

A. Coverage Questions

The initial issue to be confronted concerns the applicability of section 5 to the *types* of "qualification . . . standard, practice, or procedure."[121] The Supreme Court clearly announced in *Allen v. State Board of Elections*[122] that all proposals envisioning changes in voting procedures are subject to preclearance. Nevertheless, "coverage" is also pertinent to other classifications into which the various fact situations can be grouped.[123] For example, where more complex issues such as reapportionment are involved, the origin of the change plays an important role in determining section 5 applicability: changes initiated by the submitting authority are covered[124] while those adopted or ordered by the courts are not.[125]

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voting procedure without preclearance. Either the Attorney General or an interested private party may initiate the suit to enjoin the state from using the new practice.

At first glance, Perkins v. Matthews, 400 U.S. 379, 381 (1971) (private action under § 5 limited to question of coverage), and United States v. Board of Supervisors, 429 U.S. 642, 646 (1977) (per curiam) (Attorney General's action under § 5 limited to question of coverage), would appear to deny the court's authority to render a constitutional ruling in a § 5 suit. Contrast these two cases, however, with Powell v. West, 413 U.S. 901 (1973), *aff'g mem.* Twiggs v. West, No. 71-1106 (D.D.C. April 7, 1972) (three-judge court) (originally a § 5 suit rendering a proposed change constitutional) which the Supreme Court approved as the basis for the Attorney General's deferral in Morris v. Gressette, 97 S. Ct. at 2415-16 & n.7.

[118] 393 U.S. 544 (1969).

[119] 400 U.S. 379 (1971).

[120] Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 Am. U.L. Rev. 111, 124-27 (1972). Preclearance actions processed by the Attorney General have been significant only since 1970. *1975 Hearings*, *supra* note 4, at 597.

[121] 42 U.S.C. § 1973c (Supp. V 1975).

[122] 393 U.S. 544 (1969). See notes 24 & 25 and accompanying text *supra*.

[123] These additional coverages may or may not be required to be heard before a three-judge court as are those noted in the text accompanying note 122 *supra*. See section III. *B. infra*.

[124] "Congress intended to reach any state enactment . . . ." 393 U.S. at 566.

[125] East Carroll Parish School Bd. v. Marshall, 424 U.S. 636, 638 n.6 (1976) (per

curiam) ("court-ordered [voting changes] resulting from equitable jurisdiction over adversary proceedings are not controlled by § 5"); Connor v. Johnson, 402 U.S. 690, 691 (1971) (per curiam) ("A decree of the United States District Court is not within the reach of Section 5 . . . ."); *accord,* Panior v. Iberville Parish School Bd., 536 F.2d 101, 105 (5th Cir. 1976); Reese v. Dallas County, Ala., 505 F.2d 879, 885 n.9 (5th Cir. 1974), *rev'd per curiam on other grounds,* 421 U.S. 477 (1975); Parnell v. Rapides Parish School Bd., 425 F. Supp. 399, 406 (W.D. La. 1976). An argument to the contrary has been suggested, since § 5's language to the effect that preclearance applies to voting changes which a state or subdivision "shall enact or seek to administer" would appear to demand preclearance of state action even if pursuant to a court order. Roman, *supra* note 120, at 124; *accord,* Zimmer v. McKeithen, 485 F.2d 1297, 1302 n.9 (5th Cir. 1973) (en banc), *aff'd per curiam sub nom.*, East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).

The origin of the plan adopted by the court is also a factor requiring inspection. East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976), appears to settle the issue since § 5 was held not to apply to a plan presented in response to a court order by the body responsible for the reapportionment involved. *Id.* at 638 n.6. The Attorney General, however, had previously objected to the state legislation which empowered the defendant school board to reapportion itself. Thus, in reality, the school board had no authority to do so. *Id.* Consequently, a reasonable argument can be made that a plan proposed to the court by a reapportioning body, with authority from the state and under a state-imposed duty to redistrict, is not court-ordered and therefore is subject to § 5. Such a contention was made by plaintiffs in Kirksey v. Board of Supervisors, 528 F.2d 536, 540 (5th Cir. 1976) (challenging a court-ordered redistricting plan devised by defendants), *rev'd on rehearing en banc,* 554 F.2d 139 (5th Cir. 1977), *petition for cert. filed,* 46 U.S.L.W. 3243 (U.S. Sept. 30, 1977) (No. 77-499), although the *Kirksey* hypothesis was broadened by an extension to all court-adopted plans that were not "court-*formulated.*" 528 F.2d at 540. The original *Kirksey* panel rejected the argument but approved the plan. *Id.* The court did not discuss the § 5 issue on rehearing since it was mooted by invalidation of the plan. *See* 554 F.2d at 542-43; *cf.* Wise v. Lipscomb, 46 U.S.L.W. 3137, 3137 n.2 (Powell, Circuit Justice, Aug. 30, 1977) (application for stay of judgment) ("The distinction is between a court-ordered plan, which may or may not have been proposed by a legislative body, and a court-approved plan, which has been initiated and promulgated as law by the legislative body.").

Some courts, in a dubious extension of *Connor,* have held that a state court decree is not an enactment, standard, practice or procedure subject to § 5. Gangemi v. Sclafani, 506 F.2d 570, 572 (2d Cir. 1974); Webber v. White, 422 F. Supp. 416, 427 (N.D. Tex. 1976). The *Gangemi* court, for example, reasoned that its conclusion was required by a direct extension of *Connor.* 506 F.2d at 572. Such logic is questionable since it is the intrinsic supremacy of the federal courts as guardians of federal law and not the existence of a common judicial function which produces the exemption. The court's argument can be strengthened, however, by reference to the reason for formulation of the *Connor* rule—a three-judge court in the Southern District of Mississippi which has evaded private plaintiffs' quest for a constitutional apportionment for 12 years. *Webber,* on the other hand, explored the subject more thoroughly and offered several "reasons why state judicial lawmaking (construction, interpretation, embellishment, etc. of statutes and administrative orders), as opposed to judicial enforcement of unsubmitted enactments should not be covered by [§ 5]." 422 F. Supp. at 427. The reasons include: (1) the number of submissions based on court decisions would be too great; (2) the state cannot officially speak for or defend judicial opinions; (3) appeals to the Supreme Court by state court litigants is a proper protection of voting rights; and (4) other federal remedies are also available. As to the fourth rationale, the court recommended 42 U.S.C. § 1973 (Supp. V 1970) (general section under the Act which parallels the fifteenth amendment) as a statute under which a suit collaterally attacking a state court judgment could be brought. 422 F. Supp. 427-28.

A second coverage question concerns preexisting provisions in proposed voting changes. *Beer v. United States*[126] considered a New Orleans redistricting plan, one facet of which included maintaining two at-large city council positions. The Court held that because "[t]he at-large seats [had] existed without change since 1954, [they] were not subject to review . . . under § 5."[127] It is unclear, however, how far this ruling can be extended to other situations since the Court expressly reserved the question of preexisting parts of reapportionment plans.[128] Since reapportionment/redistricting proposals carry the most complicated constitutional standards of all voting changes, it is unlikely that the *Beer* reservation will apply to other less complicated proposals.[129] It is sug-

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The reasoning of *Connor* and *East Carroll Parish* favoring court-ordered plans is consistent with the higher standards to which courts are held in forming constitutionally acceptable voting plans. Connor v. Johnson, 402 U.S. 690, 692 (1971) (per curiam) (courts must favor single-member districts over multi-member districts when adopting their own plans in reapportionment cases); *accord,* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636, 639 (1976) (single-member districts "preferred absent unusual circumstances"); Chapman v. Meier, 420 U.S. 1, 17-19, 26-27 (1975); Kirksey v. Board of Supervisors, 554 F.2d 139, 150-51 (5th Cir. 1977) (en banc), *petition for cert. filed,* 46 U.S.L.W. 3243 (U.S. Sept. 30, 1977) (No. 77-499). *Contra,* Roman, *supra* note 120, at 124 (*Connor* rule "incompatible with *Allen* and *Perkins*" and "deserves reconsideration").

Beyond the single-, multi-member district standards, § 5 standards for enacted and adopted plans are at odds. This factor has prompted one state legislator in Mississippi to propose a novel solution to the state's marathon battle in the *Connor* case. At stake are the historical districts drawn on county lines and the political futures of several incumbent legislators who, if the plaintiffs win their long-sought apportionment, will be forced to face each other in newly drawn districts. With this element in mind, the legislature has refused to draw an acceptable plan, apparently willing to accept "come-what-may" from the courts. The three-judge court sitting in the case has also failed to find the proper formula. *See generally* Connor v. Finch, 97 S. Ct. 1828, 1833-36 (1977). The proposal hopes to take advantage of the dual standard by developing two plans. One will be duly enacted and submitted to the Attorney General for preclearance. This action will fulfill the court's order to redistrict but is not necessarily intended to pass muster in Washington. Another plan, less stringent on the incumbent legislators and county lines, will be agreed upon informally and offered to the court for possible adoption. Since the latter plan would not constitute a legislative enactment, it would not need approval if accepted by the court. *Lawmakers Face Facts on Needs for Remapping,* Commercial-Appeal (Memphis, Tenn.), Aug. 21, 1977, § A, at 3, col. 1. One problem with the proposal is that the case no longer turns on statutory construction and instead now rests squarely on the constitutionality of the apportionment, a matter of continuing importance to the Supreme Court. To the extent the move is intended to be dilatory, however, it will probably succeed.

[126] 425 U.S. 130 (1975). See notes 50 through 58 and accompanying text *supra.*

[127] 425 U.S. at 139 (footnote omitted); *accord,* Pitts v. Cates, 536 F.2d 56, 59-60 (5th Cir. 1976) (per curiam).

[128] 425 U.S. at 139 n.10. This reservation continued the initial one made on the same issue in Georgia v. United States, 411 U.S. 526, 535 n.7 (1973).

[129] The nature of most changes, *e.g.,* polling places, election dates, ballot procedures, favors simple judicial segregation of the unaffected preexisting components of an overall scheme from the new procedures. On the other hand, an annexation is a change to the entire municipality and would leave no unchanged areas.

gested that when the reserved issue is decided, the *Allen* concept recognizing alternative constitutional remedies[130] and the *Beer-Richmond* standards of strict construction of the Act[131] will allow areas or representative seats unchanged in a reapportionment to pass free of preclearance.

A final aspect of section 5 coverage relates to the nature of the political subdivision which enacts the voting change. The question arises from the section 4 "trigger"[132] which requires preclearance of "any State or . . . any political subdivision of a state"[133] falling under the established criteria. Political subdivisions are defined by the Act as "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision which conducts registration for voting."[134] Although most courts have concluded that municipalities are political subdivisions under section 4,[135] a strict reading of the statute can lead to a different conclusion.[136] Under Alabama law, for example, municipalities do not conduct registration and simply receive voter lists from the county. Relying on the legislative history of the Act,[137] a three-judge

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[130] 393 U.S. at 549-50 (denial of statutory remedy does not preclude "traditional suits attacking . . . constitutionality"). This concept was cited with approval in Morris v. Gressette, 97 S. Ct. 2411, 2419-20 (1977).

[131] See notes 36 through 58 and accompanying text *supra*.

[132] 42 U.S.C. § 1973b (Supp. V 1975). See note 18 and accompanying text *supra*.

[133] 42 U.S.C. § 1973b(f) (Supp. V 1975).

[134] *Id.* § 1973*l*(c)(2) (1970); *accord,* United States v. County Comm'n, 425 F. Supp. 433, 435-36 (S.D. Ala. 1976) (per curiam), *aff'd*, 97 S. Ct. 1540 (1977).

[135] *See, e.g.*, Perkins v. Matthews, 400 U.S. 379, 381 n.2 (1971) ("Mississippi and its subdivisions have been determined to be covered by the Act."); United States v. Garner, 349 F. Supp. 1054, 1056 (N.D. Ga. 1972) (three-judge court) (per curiam) (holding municipal election unlawful).

[136] *See* Gomez v. Galloway, 428 F. Supp. 358, 359 (S.D. Tex. 1977) (city held not to be a political subdivision). The term "shall include" might be construed to exclude counties or parishes where "any other subdivision" conducts voter registration. Under this interpretation, a change in registration responsibiity from a county to a municipality would shift the § 5 burden. It is conceivable then that switching responsibility for voting registration from one entity might avoid preclearance if changes were accomplished or established prior to the switch. However, the question remains as to whether the shift itself is a change subject to § 5. At first blush, one would venture an affirmative answer based on "purpose or effect." Yet the effect is certainly derivative and a case could be made for preclearance if sufficient excuses and a receptive court could be found.

[137] This definition makes clear that the term 'political subdivision' is not intended to encompass precincts, election districts, or other similar units when they are within a county or parish which supervises registration for voting.
[1965] U.S. Code Cong. & Ad. News 2569, *quoted in* United States v. Board of Comm'rs, 430 F. Supp. 786, 788-89 (N.D. Ala. 1976), *prob. juris. noted*, 97 S. Ct. 2970 (1977) (No. 76-1662). *But see* United States v. County Comm'n, 425 F. Supp. 433, 437-40 (S.D. Ala. 1976) (per curiam) (dictum) (only issue was coverage of a county charged with responsibil-

court held that the city of Sheffield, Alabama, was not a political subdivision because the county, not the city, conducted the registration process.[138] The question is now before the Supreme Court,[139] and its penchant for restrictively construing the Act[140] raises the possibility that municipalities not involved in registration will not be held subject to section 5.

B. Role of the Courts

"Any action under this section [section 5] shall be heard and determined by a court of three judges . . . ."[141] *Allen* first construed the meaning of "under this section" to include three situations:

> First, of course, the State may institute a declaratory judgment action. Second, an individual may bring a suit for declaratory judgment and injunctive relief, claiming that a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny. Third, the Attorney General may bring an injunctive action to prohibit the enforcement of a new regulation because of the State's failure to obtain approval under § 5.[142]

Each of these situations warranted full compliance with the mandate for three-judge courts.

> In drafting § 5, Congress apparently concluded that if the governing authorities of a State differ with the Attorney General of the United States concerning the purpose or effect of a change in voting procedures, it is inappropriate to have that difference resolved by a single district judge. The clash between federal and state power and the potential disruption to state government are apparent. There is no less a clash and potential for disruption when the disagreement concerns whether a state enactment is subject to § 5. The result of both suits can be an injunction prohibiting the State from enforcing its election

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ity for voter registration). The court quoted legislative history to the effect that "[w]here an entire State [is covered by the Act,] each and every political subdivision within that State" is also covered. *Id.* at 439, *quoting* H.R. REP. No. 439, 89th Cong., 1st sess., 25, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 2437, 2456. This, of course, begs the question since the term political subdivisions has a meaning of its own.

[138] 430 F. Supp. at 789.

[139] United States v. Board of Comm'rs, 430 F. Supp. 786 (N.D. Ala. 1976) (three-judge court), *prob. juris. noted*, 97 S. Ct. 2970 (1977) (No. 76-1662).

[140] See notes 40 through 42, 54 & 108 and accompanying text *supra*.

[141] 42 U.S.C. § 1973c (Supp. V 1975); *cf.* 28 *id.* § 2284 (1970) *as amended by* Act of Aug. 12, 1976, Pub. L. No. 94-381, § 3, 90 Stat. 1119 (calling for three-judge courts where otherwise necessitated by law and "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body").

[142] 393 U.S. at 561.

> laws. Although a suit brought by an individual may not involve the same federal-state confrontation, the potential for disruption of state election procedures remains.[143]

The first type of case is necessarily brought in the district court for the District of Columbia, the only court which can issue a preclearance declaratory judgment.[144] The second type can be brought by either private litigants or the Attorney General and is local to the voting practice sought to be enjoined.[145] A three-judge court in the District of Columbia is limited to "the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color' "[146] in a suit under section 5. Local three-judge courts, on the other hand, are "limited to the determination whether 'a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny.' "[147]

The necessity for a three-judge court in local coverage suits under section 5 is well established.[148] From this it follows that in a coverage question, a single-judge court is without jurisdiction to hear the case[149] or, in a properly pleaded suit, without power to deny that a three-judge court is necessary[150] unless a case is so clear that it demands a judgment

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[143] *Id.* at 562.

[144] Voting Rights Act § 14(b), 42 U.S.C. § 1973*l*(b) (1970); Perkins v. Matthews, 400 U.S. 379, 384-85 (1971); Allen v. State Bd. of Elections, 393 U.S. 544, 557-59 (1969).

[145] *See* Allen v. State Bd. of Elections, 393 U.S. 544, 550 (1969) (private litigants appealing from decisions in local three-judge courts); Georgia v. United States, 411 U.S. 526, 527-28 (1973) (state's appeal from action instituted by Attorney General in local three-judge court).

[146] Perkins v. Matthews, 400 U.S. 379, 385 (1971).

[147] *Id.* at 383 (private litigants); *accord,* United States v. Board of Supervisors, 429 U.S. 642, 646 (1977) (Attorney General).

[148] *See, e.g.,* United States v. Cohan, 470 F.2d 503, 504 (5th Cir. 1972) (single-judge district court without jurisdiction to determine § 5 violations); Beatty v. Esposito, 411 F. Supp. 107, 110 (E.D.N.Y. 1976) (single-judge court powerless to determine if certain practice was governed by § 5); Pitts v. Carter, 380 F. Supp. 4, 6-7 (N.D. Ga. 1974) (three-judge court) (per curiam) (voting rights contest requires three-judge court).

[149] Sumter County Democratic Exec. Comm. v. Dearman, 514 F.2d 1168, 1170 (5th Cir. 1975); United States v. Cohan, 470 F.2d 503, 504 (5th Cir. 1972).

[150] *See* Sumter County Democratic Exec. Comm. v. Dearman, 514 F.2d 1168, 1170 (5th Cir. 1975) (even initial determination requires a three-judge court). *But see* Webber v. White, 422 F. Supp. 416, 428-29 (N.D. Tex. 1976) (single-judge court) (decisions of state courts not subject to § 5); Pena v. Nelson, 400 F. Supp. 493, 496-97 (D. Ariz. 1975) (single-judge court) (no necessity to convene three-judge court where voting change was inapplicable to future elections and where holding was declaratory rather than injunctive); *cf.* Nomey v. Jackson Parish Police Jury, 343 So. 2d 315, 317 (La. App. 1977) (en banc) (valid claim of § 5 violation summarily dismissed since racial discrimination not at issue). A single-judge court may, however, enjoin an obvious violation of § 5 when a change is being implemented without preclearance. *See* Broussard v. Perez, 416 F. Supp. 584, 587-88 (E.D. La. 1976) (objection had been interposed).

in the plaintiff's favor.[151] The courts of appeal are also without jurisdiction to hear a coverage suit originally decided by a single judge, and any such case must be remanded to a three-judge court.[152] When a three-judge court decides the change in question is not covered by section 5, the court is without jurisdiction and must be dissolved.[153]

The coverage question[154] includes other classifications in addition to the nature of the change. Whether a three-judge court is required to hear these claims varies depending on the nature of the situation. Questions concerning the origins of a change[155] or preexisting portions of a change[156] both require a determination that a change has in fact been made and, hence, a three-judge court. But the question of whether a particular political subdivision is covered by the Act[157] precedes the issue of strict section applicability in any case. Since an exempt entity cannot produce a change violative of section 5,[158] the necessity of a three-judge court for purposes of confirming the exemption from preclearance requirements is obviated.[159] Taking their cue from ritual exhortations about the burdens inherent in three-judge courts reiterated in *Allen,*[160] lower courts have advocated remanding issues tangential to coverage to single-judge courts.[161]

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[151] Broussard v. Perez, 416 F. Supp. 584, 586-87 (E.D. La. 1976) (where defendants' claims are clearly rebuttable so as to deny any contest and issue of suit is clearly covered by § 5, three-judge court is not necessary).

[152] Pitts v. Cates, 536 F.2d 56, 60 (5th Cir. 1976); Sumter County Democratic Exec. Comm. v. Dearman, 514 F.2d 1168, 1170 (5th Cir. 1975); United States v. Cohan, 470 F.2d 503, 505 (5th Cir. 1972).

[153] *See, e.g.,* Gordon v. Executive Comm. of the Democratic Party, 335 F. Supp. 166, 170 (D.S.C. 1971) (three-judge court) (per curiam) (three-judge court dissolved for lack of jurisdiction); Conner v. Board of Supervisors, 334 F. Supp. 280, 285 (N.D. Miss. 1971) (three-judge court) (per curiam) (same).

[154] See section II. *A. supra.*

[155] See notes 124 & 125 and accompanying text *supra.*

[156] See notes 126 through 131 and accompanying text *supra.*

[157] See notes 132 through 140 and accompanying text *supra.*

[158] *See* Gomez v. Galloway, 428 F. Supp. 358, 359 (S.D. Tex. 1977) (town is not a "political subdivision" under the Act); United States v. Board of Comm'rs, 430 F. Supp. 786, 789 (N.D. Ala. 1976) (three-judge court) (same), *prob. juris. noted,* 97 S. Ct. 2970 (1977) (No. 76-1662).

[159] Gomez v. Galloway, 428 F. Supp. 358, 359 (S.D. Tex. 1977). However, a three-judge court would not be precluded from making such a confirmation. *See* United States v. Board of Comm'rs, 430 F. Supp. 786, 788 (N.D. Ala. 1976) (three-judge court) (holding municipality not subject to preclearance since not political subdivision), *prob. juris. noted,* 97 S. Ct. 2970 (1977) (No. 76-1662).

[160] We have long held that congressional enactments providing for the convening of three-judge courts must be strictly construed. Convening a three-judge court places a burden on our federal court system, and may often result in a delay in a matter needing swift initial adjudication.

393 U.S. at 561 (citations omitted).

[161] *E.g.,* Bond v. White, 508 F.2d 1397, 1400 (5th Cir. 1975) ("This procedural alterna-

When fourteenth or fifteenth amendment claims are pleaded concurrently with a Voting Rights Act cause of action, some confusion exists as to whether the constitutional or statutory case will take precedence. In *Zimmer v. McKeithen*,[162] the Fifth Circuit en banc addressed the constitutional issue.[163] The case cannot be considered decisive on the point, however, since the statutory claim was denied by the rule of *Connor v. Johnson*[164] allowing court-ordered plans to avoid preclearance. The Fourth Circuit, confronted with a "tangential" Voting Rights Act claim,[165] also found the constitutional issues dispositive.[166] The Supreme Court, however, has at least implied a contrary ruling in a recent case[167] which reversed a three-judge court's actions as beyond the purview of section 5. After finding a section 5 violation, the district court granted an injunction against new elections until a constitutional plan could be found.[168] The Court held that the *Allen* limitations also apply to actions brought by the Attorney General and that discrimination vel non under a covered change can be determined only by the district court for the District of Columbia.[169]

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tive [of remanding to a single-judge court] minimizes the burden that the three-judge court requirement imposes on federal judiciary."); *accord,* Pitts v. Carter, 380 F. Supp. 4, 8 (N.D. Ga. 1974) (three-judge court) (per curiam); Yelverton v. Driggers, 370 F. Supp. 612, 614 n.3 (M.D. Ala. 1974). *But see* Morris v. Gressette, 425 F. Supp. 331 (D.S.C. 1976) (three-judge court) (issue of reviewability heard by a three-judge court), *aff'd*, 97 S. Ct. 2411 (1977). *See generally* note 101 *supra.*

Bond v. White, 508 F.2d 1397, 1399 (5th Cir. 1975), relied on the Supreme Court's holding in Public Serv. Comm'n v. Brashear Freight Lines, 312 U.S. 621 (1941), which allowed a three-judge court hearing a constitutional issue to remand the damages segment of the case to a single judge.

[162] 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd per curiam sub nom.*, East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).

[163] 485 F.2d at 1302. There is reason to question the circuit court's jurisdiction to hear the statutory issue. See notes 148 through 152 and accompanying text *supra*; *cf.* note 101 *supra* (questioning necessity of a three-judge court to hear issue of reviewability).

[164] 402 U.S. 690, 691 (1971). See note 125 and accompanying text *supra.*

[165] United States v. Saluda County School Dist. No. 1, 488 F.2d 804 (4th Cir. 1973) (en banc) (per curiam).

[166] *Id.* at 806 n.1.

[167] United States v. Board of Supervisors, 429 U.S. 642 (1977) (per curiam).

[168] The plan that violated § 5 also violated the fifteenth amendment. *Id.* at 646 n.2.

[169] *Id.* at 646.

Is the manner of pleading determinative, or can either type of case be sufficient? If the latter, the real question when both issues are provable by the plaintiff is which will be the basis of the decision. Unfortunately, only these few cases even obliquely approach the issue and are inadequate precedent for a clear answer.

Other court-related issues have also received minimal treatment. (1) *Removal.* Removal has been permitted under the Voting Rights Act. Whatley v. City of Vidalia, 399 F.2d 521, 521-22 (5th Cir. 1968) (42 U.S.C. § 1973i (Supp. V 1975) is a proper basis for removal); *accord,* Thompson v. Brown, 434 F.2d 1092, 1096 (5th Cir. 1970) (holding trial court erred in remanding case which was removed pursuant to 28 U.S.C. § 1443(1) (1970)).

C. Role of the Attorney General

It has been suggested that preclearance by the Attorney General be limited in such a manner that any voting changes "which within fifteen days of receipt are found to involve complex questions of law and fact" should be transferred to the District of Columbia district court.[170] The proposal was made on the grounds that it more closely reflects Congress' original intentions.[171] Congress, however, appears satisfied to let the Justice Department continue its preclearance function as the alternative procedures were not modified by the 1975 amendment.

The Attorney General's office, since it received no specific guidance from the Act, formulated administrative rules to govern its responsibilities under section 5.[172] These regulations were first given the Court's imprimatur in *Georgia v. United States*[173] to the extent they "are reasonable and do not conflict with the Voting Rights Act itself."[174] A review

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(2) *Abstention.* In United States v. Texas, 430 F. Supp. 920 (S.D. Tex. 1977) (three-judge court), the Attorney General contested a voting questionnaire employed by a local registrar to screen college students who were eligible to vote in the jurisdiction. *Id.* at 922-23. The court abstained, noting that the procedures complained of were employed state-wide, making an overriding question of unsettled state law. *Id.* at 927-29. The government did not deny that abstention was otherwise appropriate but contended that § 5 constituted a "per se exception to the abstention doctrine because it [vests] the Court with mandatory federal jurisdiction." *Id.* at 929. The court relied on Harrison v. NAACP, 360 U.S. 167, 177 (1959), where the Supreme Court refuted the assertion that there should be a per se exception to abstention in civil rights cases, and Manard v. Miller, 53 F.R.D. 610, 611 (E.D. Va. 1971) (three-judge court) (abstention in voting rights case), *aff'd mem.*, 405 U.S. 982 (1972). The Fifth Circuit touched briefly on the issue in Ballas v. Symm, 494 F.2d 1167 (5th Cir. 1974), and implied approval of abstention in certain fact situations, *e.g.*, where "state statutes clearly provide a method" for deciding the question. *Id.* at 1170. The Second Circuit also urged abstention in state election cases until any state proceedings were concluded but allowed intervention, "albeit reluctantly," due to the "exigencies of time . . . and the federal questions raised." Gangemi v. Sclafani, 506 F.2d 570, 572 (2d Cir. 1974). The Supreme Court, however, has denied abstention in one pre-Act constitutional voting rights case. Harman v. Forssenius, 380 U.S. 528, 534-37 (1965) (abstention inappropriate where fundamental right involved). *Compare* Cochran, *Civil Rights Litigation in the Fifth Circuit: Part I*, 48 MISS. L.J. 377, 380 n.14 (1977) (abstention inapplicable in civil rights cases) *with Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1250-54 (1977) (contra).

[170] Roman, *supra* note 120, at 130.

[171] *Id.* at 130-31. At the time the article was written the author was an attorney for the Civil Rights Division of the Justice Department. His sugestions were apparently made from both workload and conceptual standpoints. Ostensibly, the transfer to the courts would provide substantive, judicial guidelines. Assessing the current state of the voting rights cause of action five years after the article, it is suggested that the courts are now confronted with sufficient numbers of diverse cases to develop such guidelines.

[172] Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. §§ 51.1- .29 (1976).

[173] 411 U.S. 526 (1973).

[174] *Id.* at 536.

of the guidelines themselves will sustain the conclusion that a lifetime of legal wrangles would not produce the uniform procedures which were provided at one swift stroke.[175]

In *Georgia v. United States*, state officials had submitted a proposed voting change to the Justice Department and received a reply stating that additional information was required before the submission could be processed. The reply continued that the sixty-day period for interposing an objection would not begin until the information was received.[176] The requested information was submitted several months later and the Attorney General's objection noted within the next 60 days. Before the Supreme Court, Georgia contended "that the Attorney General [had] granted himself more time than the statute provides."[177] The Court dealt with the claim summarily, stating that the alternative posed by the Georgia challenge would require the Attorney General to object perfunctorily to any incomplete submissions. The regulations, on the other hand, provide the fairer method of allowing a valid decision based on all the facts.

Regulations covering the sixty days[178] during which the Attorney General may object[179] permit initiation of the period after receipt of a proper submission,[180] any requested additional information necessary to constitute a proper submission[181] or a request for reconsideration.[182] They

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[175] The regulations pertaining to the Voting Rights Act were issued in September, 1971. Roman, *supra* note 120, at 128.

[176] In accordance with 28 C.F.R. § 51.18 (1976).

[177] 411 U.S. at 540.

[178] The necessity of the Attorney General's continued compliance with the 60-day period was implicitly reinforced in Morris v. Gressette, 97 S. Ct. 2411 (1977), see notes 95 through 114 and accompanying text *supra*, which held that a court-ordered objection beyond the 60 days was ineffective. 97 S.Ct. at 2424. *Morris* overruled Harper v. Levi, 520 F.2d 53 (D.C. Cir. 1975), a collateral case which held that late objections were acceptable when ordered by the court.

[179] The Attorney General has the option to indicate affirmatively before the 60 days expire that no objection will be made. If the approval were withdrawn prior to the sixtieth day, courts would most likely render the objection void. *See* United States v. Board of Comm'rs, 430 F. Supp. 786 (N.D. Ala. 1976) (three-judge court) (implied approval estopped government from later objection), *prob. juris. noted*, 97 S. Ct. 2970 (1977) (No. 76-1662). See notes 201 through 203 and accompanying text *infra*.

[180] 28 C.F.R. § 51.3(b) (1976). Standards for an acceptable submission are enunciated in *id.* § 51.10. See note 187 *infra*. "Formal" submissions are required. Allen v. State Bd. of Elections, 393 U.S. 544, 571 (1969); *see* Moore v. Leflore County Bd. of Supervisors, 351 F. Supp. 848, 851 (N.D. Miss. 1971) (three-judge court) (no submission or approval implied by Attorney General's actual notice of implemented changes).

[181] 28 C.F.R. § 51.3(b) (1976); *accord*, Broussard v. Perez, 416 F. Supp. 585, 587 (E.D. La. 1976). Procedures allowing requests for additional information are contained in 28 C.F.R. § 51.18 (1976) which imposes a good faith requirement on the Attorney General by allowing a full 60-day review after receiving the additional information. The only limitation is that the request for such information "shall be made as promptly as possible

also provide for counting the period by calendar days,[183] and if the last day of the period is Saturday, Sunday or a national holiday, the time for response is extended until the next working day.[184] Finally, the official date of the response is the date the reply is mailed by the Justice Department.[185]

Submissions for preclearance by states and their political subdivisions may not be premature[186] but must contain all required information, including such other "supporting materials [as will] assist the Attorney General in his consideration."[187] When the Attorney General

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after receipt of the original inadequate submission." *Id.* § 51.18(a). It is possible for the Attorney General to extend his time up to 120 days plus any delay in the supplemental submission.

[182] 28 C.F.R. § 51.3(d) (1976). The Attorney General will also have at least 15 days after any conference requested by the submitter. *Id.* Requests for reconsideration are authorized, and either party may call for a conference. *Id.* § 51.23.

[183] *Id.* § 51.3(c).

[184] *Id.*; *accord,* United States v. Board of Comm'rs, 430 F. Supp. 786, 787-89 (N.D. Ala. 1976) (three-judge court), *prob. juris. noted on other issues*, 97 S. Ct. 2970 (1977) (No. 76-1662).

[185] 28 C.F.R. § 51.3(c) (1976). The Justice Department often completes requirements near or on the last day of an alloted period. One can only surmise what might happen if the objection is mailed or postmarked one day after the expiration of the limitation period. Since the requirement is statutory, it is likely that the objection would be discounted.

[186] *Id.* § 51.7 (not before "final enactment or final administrative decision [or final] approval by referendum or by a court"); *accord*, Broussard v. Perez, 416 F. Supp. 584, 587-88 (E.D. La. 1976) (premature submission did not begin 60-day period).

As an interesting illustration of prematurity, consider Sperry Rand Corp. v. City of Jackson, 248 So. 2d 810 (Miss. 1970). The appellants challenged a chancellor's decree ratifying a city annexation on the grounds that the annexation violated § 5. *Id.* at 812. The Mississippi Supreme Court correctly decided that the only issue before it was the city's observance of state law, whereas § 5 concerned enforcement. *Id.* Furthermore, the question of enforcement could not properly be raised, *i.e.* was premature, until after the annexation was declared valid by the chancellor, and since appellants were contesting the decree itself, the challenge was without merit. *Id.*

[187] 28 C.F.R. § 51.10(b) (1976). Section 51.10(a) provides:

> Contents of submissions.
>
> (a) Each submission shall include:
>
> (1) A copy of any legislative or administrative enactment or order embodying a change affecting voting, certified by an appropriate officer of the submitting authority to be a true copy.
>
> (2) The date of final adoption of the change affecting voting.
>
> (3) Identification of the authority responsible for the change and the mode of decision (e.g., act of State legislature, ordinance of city council, redistricting by election officials).
>
> (4) An explanation of the difference between the submitted change affecting voting and the existing law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the existing and proposed situation with respect to voting. When the change will affect less than the whole State or subdivision, such explanation should include a description of

receives a submission which does not contain all the required information,[188] or when other information is necessary for a determination, he may request it from the submitter.[189] To encourage participation by interested parties he may also "take steps to provide public notice" if the submitting authority has not done so.[190]

The substantive guidance which the Justice Department has given itself is limited and depends primarily on discretion[191] to determine what is or is not "a racially discriminatory purpose or effect."[192] The burden of proving that no such purpose or effect exists lies with the submitting entity.[193]

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which subdivisions or parts thereof will be affected and how each will be affected.

(5) A statement certifying that the change affecting voting has not yet been enforced or administered, or an explanation of why such a statement cannot be made.

(6) With respect to redistricting, annexation and other complex changes, other information which the Attorney General determines is required to enable him to evaluate the purpose or effect of the change. Such other information may include items listed under paragraph (b) of this section. When such other information is required, the Attorney General shall notify the submitting authority in the manner provided in § 51.18(a).

Subsection (b) details the types of additional "supporting materials" which the Justice Department considers "appropriate." *Id.* § 51.10(b).

[188] *Id.* § 51.10(a). See note 187 *supra*.

[189] *Id.* § 51.18.

[190] *Id.* § 51.18(c).

[191] The Attorney General will be afforded deference in interpreting the Voting Rights Act. Perkins v. Matthews, 400 U.S. 379, 390-91 (1971); City of Petersburg v. United States, 354 F. Supp. 1021, 1031 (D.D.C. 1972) (three-judge court) (per curiam), *aff'd mem.*, 410 U.S. 962 (1973).

[192] 28 C.F.R. § 51.19 (1976). Section 51.19 provides in pertinent part:

The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority.

[193] *Id.; accord,* Harper v. Levi, 520 F.2d 53, 70 (D.C. Cir. 1975), *disapproved on other grounds*, Morris v. Gressette, 97 S. Ct. 2411 (1977). The regulation reasons that the Attorney General makes the same decision as the alternate approving agency, the district court for the District of Columbia, and therefore the burden of proof should be the same. The imposition of the burden of proof on the party seeking to change voting procedures was declared constitutional in South Carolina v. Katzenback, 383 U.S. 301, 335 (1966),

Although the Act itself appears to require action only upon objection,[194] the regulations require that an approval[195] or an objection be affirmatively stated and communicated to the submitting party.[196] At least one court has decided that failure to interpose an objection cannot constitute an approval.[197] While other courts have justifiably refused to go so far, they have conclusively decided ambiguous objections in favor of the Attorney General.[198] Ambiguity may result when the change involved is accomplished in more than one step, as when a local ordinance is passed pursuant to an authorization by a previously precleared state law. In one such case, the original approval was held to cover the subsequent ordinance.[199] But where the Attorney General explicitly reserves objection to the initial submission to allow review of the final enactment, objection is not waived.[200] Problems also arise when the Justice Department's reaction to the initial phase of the change is an ambiguous or limited approval. In *United States v. Board of Commissioners*,[201] the Attorney General approved a referendum on the issue of changing the form of a city government with an accompanying warning that no approval of the actual change in government was to be presumed if it

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and sustained in City of Petersburg v. United States, 354 F. Supp. 1021, 1028 (D.D.C. 1972) (three-judge court), *aff'd mem.*, 410 U.S. 962 (1973), and Georgia v. United States, 411 U.S. 526, 538 & n.9 (1973).

[194] 42 U.S.C. § 1973c (Supp. V 1975) (voting change enforceable if "Attorney General has not interposed an objection within sixty days"); Harper v. Levi, 520 F.2d 53, 73 (D.C. Cir. 1975) (MacKinnon, J., dissenting) (§ 5 "authorizes approval by *inaction*"), *disapproved in* Morris v. Gressette, 97 S. Ct. 2411 (1977).

[195] Approvals are termed decisions not to object. 28 C.F.R. § 51.20 (1976).

[196] *Id.* §§ 54.20- .21.

[197] Moore v. Leflore County Bd. of Election Supervisors, 351 F. Supp. 848, 851 (N.D. Miss. 1971) (three-judge court) (facts arising before promulgation of administrative guidelines).

[198] Georgia v. United States, 411 U.S. 526, 538-39 (1973) ("Though the choice of language in the objection letter . . . was not a model of precision, . . . his objection . . . was lawful and effective."); United States v. Cohan, 358 F. Supp. 1217, 1219 (S.D. Ga. 1973) (three-judge court) (mere objection sufficient); Evers v. State Bd. of Election Comm'rs, 327 F. Supp. 640, 644 (S.D. Miss. 1971) (three-judge court) (per curiam) (ambiguous answer to proposed change equated to lack of "required federal scrutiny"), *appeal dismissed as untimely*, 405 U.S. 1001 (1972). *Contra*, 405 U.S. at 1003 (Blackmun, J., concurring) (failure to object implies approval).

[199] Jenness v. Little, 306 F. Supp. 925, 927 (N.D. Ga. 1969) (three-judge court), *appeal dismissed as moot sub nom.*, Matthews v. Little, 397 U.S. 94 (1970). The precedential value of this holding is weakened, however, by the fact that the change, which involved a revised, lower schedule for political candidates' qualifying fees, resulted in an increase in minority voting strength. 306 F. Supp. at 927-28.

[200] Broussard v. Perez, 416 F. Supp. 584, 587-88 (E.D. La. 1976) (objection to state law withdrawn to allow review of local plans).

[201] 430 F. Supp. 786 (N.D. Ala. 1976), *prob. juris. noted*, 97 S. Ct. 2970 (1977) (No. 76-1662).

passed the vote. When the newly ratified change was submitted "out of an abundance of caution," the Attorney General objected. The Justice Department brought suit after the city attempted to implement the action despite the objection. The district court found that approval of the referendum itself foreclosed a later objection to enforcement of the referendum's results.[202] The issue awaits decision by the Supreme Court.[203]

Finally, the regulations for the enforcement of section 5 allow the Attorney General to withdraw an objection where appropriate if "there had been a substantial change in fact or law,"[204] or if previously unavailable information is brought to light.[205] As with the initial decision to object,[206] the decision to withdraw an objection is not reviewable.[207]

D. Attorneys' Fees

Private suits authorized by *Allen v. State Board of Elections*[208] have accounted for the great majority of section 5 suits. Because "Congress depends heavily upon private citizens to enforce . . . fundamental rights,"[209] its 1975 extension of the Act included a provision for awarding attorneys' fees to prevailing parties.[210] Significantly, such an award is not limited to actions brought under section 5 or the Voting Rights Act

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[202] 430 F. Supp. at 789. The Attorney General's objection was based on the city's use of at-large elections for the newly designated city officials, a requirement mandated by the Alabama law which governed the new form of government. The court held that the Attorney General had either actual or constructive knowledge of the Alabama statute at the time the referendum was approved and was therefore estopped from making a later objection. *Id.*

[203] *See* 45 U.S.L.W. 3811 (1977) (case summary of United States v. Board of Comm'rs, No. 76-1662).

[204] 28 C.F.R. § 51.25 (1976); *cf.* 42 U.S.C. § 1973c (Supp. V 1975) ("In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section.").

[205] 28 C.F.R. § 51.24. A significant possibility exists that new information can be brought to light. Section 51.26 provides for maintenance of case files and their availability to the public. Subsection (d) further states: "The Attorney General may, at his discretion call to the attention of the submitting authority or *an interested individual or group* information or comments related to a submission." *Id.* § 51.26(d) (emphasis added). See text accompanying note 190 *supra*.

[206] See section II. *B. supra*.

[207] Harris v. Bell, No. 76-1823, slip op. at 6 (D.C. Cir. Aug. 8, 1977).

[208] 393 U.S. 544 (1969).

[209] 1975 S. REP., *supra* note 5, at 40.

[210] Voting Rights Act of 1965—Extension, Pub. L. No. 94-73, title IV, § 402, 89 Stat. 400, 404 (codified at 42 U.S.C. § 1973*l*(e) (Supp. V 1975)).

but extends to all actions "to enforce the voting guarantees of the fourteenth or fifteenth amendment."[211]

Congress did not enact fees for voting rights cases in a vacuum but relied on an extensive history of similar provisions.[212] The Senate Judiciary Committee's Report on the Act cited *Bradley v. School Board*[213] for the proposition that attorneys' fees may be awarded pendente lite if appropriate[214] and are not to be precluded if the attorney does not ultimately prevail on all the issues.[215] Furthermore, "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief."[216] But where actions are "frivolous, vexatious, or brought for harassment purposes," a losing plaintiff may be forced to pay costs for opposing counsel's fees.[217] Fees are to be awarded according to prevailing standards "in other types of equally complex Federal litigation."[218] They will not be denied simply

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[211] *Id.; see* Lytle v. Commissioners of Election, 541 F.2d 421, 426 (4th Cir. 1976) (suit under 42 U.S.C. § 1983 to vindicate constitutional voting rights), *petition for cert. filed*, 44 U.S.L.W. 3739 (U.S. June 11, 1976) (No. 75-1797); Nevett v. Sides, 533 F.2d 1361, 1365 n.5 (5th Cir. 1976) (attorneys' fees to be awarded in constitutional and § 1983 reapportionment suits); Cohen v. Maloney, 428 F. Supp. 1278, 1284 (D. Del. 1977) (suit charging unconstitutional reapportionment); *accord*, Burley v. Bastrop Loan Co., Inc., 407 F. Supp. 773, 779 (W.D. La. 1975) (dictum) (attorneys' fees available in any action to enforce fourteenth and fifteenth amendment rights).

[212] *See* 1975 S. REP., *supra* note 5, at 41-43. For a discussion of similar issues regarding an almost identically worded statute, the 1976 Civil Rights Attorney's Fees Award Act, see Cochran, *supra* note 169, at 377-80.

[213] 416 U.S. 696 (1974).

[214] 1975 S. REP., *supra* note 5, at 41.

> To delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel, and discourage the institution of actions despite the clear congressional intent to the contrary . . . . A district court must have discretion to award fees and costs incident to the final disposition of interim matters.

Bradley v. School Bd., 416 U.S. 696, 723 (1974).

[215] 1975 S. REP., *supra* note 5, at 41; *accord*, Lytle v. Commissioners of Election, 541 F.2d 421, 424-25 (4th Cir. 1976), *petition for cert. filed*, 44 U.S.L.W. 3739 (U.S. June 11, 1976) (No. 75-1797).

[216] 1975 S. REP., *supra* note 5, at 41, *citing* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 429-30 (8th Cir. 1971) (injunction in employment discrimination suit denied because of defendant's post-filing ameliorative efforts; but, "[h]aving prevailed in his contentions of . . . discrimination [plaintiff] is entitled to reasonable attorney's fees").

[217] 1975 S. REP., *supra* note 5, at 41, *citing* United States Steel Corp. v. United States, 385 F. Supp. 346, 349 (W.D. Pa. 1974) (no award where government's purpose not improper), *aff'd*, 519 F.2d 359 (3d Cir. 1975).

[218] 1975 S. REP., *supra* note 5, at 41; *accord*, Panior v. Iberville Parish School Bd., 543 F.2d 1117, 1120 (5th Cir. 1976) (per curiam); Torres v. Sachs, 538 F.2d 10, 12 (2d Cir. 1976). In Ferguson v. Winn Parish Police Jury, 528 F.2d 592 (5th Cir. 1976), a prevailing plaintiff contested the amount of his award. The court of appeals affirmed the award and quickly pointed out that application of the standard was a matter for the trial court. "This

because the litigation does not produce a common fund out of which the fees can be drawn[219] nor reduced because of the nature of the entity providing the representation.[220]

With the clearcut directions of *Bradley* to guide them, courts had no trouble in quickly implementing the new fee provisions. *Bradley* had considered the question of an award of attorneys' fees under a law enacted while the case was on appeal. The Court held on direct review that

> a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.[221]

Bradley's retroactivity has been applied to allow voting rights attorneys' fees when the issue was decided after the fees amendment[222] and has

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court has consistently held that the determination of a reasonable attorney's fee is left to the sound discretion of the trial judge and is not to be set aside absent a clear abuse of that discretion." *Id.* at 599; *accord*, Panior v. Iberville Parish School Bd., 543 F.2d 1117, 1119-20 (5th Cir. 1976) (reversing minimal award as abuse of discretion).

[219] 1975 S. REP., *supra* note 5, at 41.

[220] Torres v. Sachs, 538 F.2d 10, 11-13 (2d Cir. 1976).

Some courts originally questioned the report's conclusion that awards against states were to be allowed. *E.g.*, Hall v. Issaquena County Bd. of Supervisors, 526 F.2d 711, 712-13 (5th Cir. 1976) (per curiam) (remand for review of attorneys' fees and eleventh amendment issues); *accord*, Lytle v. Commissioners of Election, 541 F.2d 421, 427 (4th Cir. 1976) (Widener, J., concurring) ("[I] disagree with the suggestion in the opinion that Congress may limit the application of the Eleventh Amendment."), *petition for cert. filed*, 44 U.S.L.W. 3739 (U.S. June 11, 1976) (No. 75-1797). The report itself states:

> Fee awards are . . . provided . . . in accordance with Congress' powers under, *inter alia*, the Fourteenth Amendment, Section 5 . . . . [D]efendants in these cases are frequently state or local bodies or state or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either from the official directly, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

1975 S. REP., *supra* note 5, at 41. The Supreme Court affirmed congressional judgment in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), when it held that attorneys' fees enacted to enforce the fourteenth amendment override the defense of eleventh amendment immunity. *Id.* at 456-57. Presumably this applies with equal validity to the fifteenth amendment.

A different defense to assessment of attorneys' fees, in the form of legislative immunity, was raised in Cohen v. Maloney, 428 F. Supp. 1278, 1280-81 (D. Del. 1977). The defendants, mayor and city council members, claimed legislative immunity under concepts established in Tenney v. Brandhove, 341 U.S. 367, 377 (1951). The *Cohen* court held that legislative immunity was an exemption from suit only, and where the officials elected to defend against the suit, they were required to compensate opposing counsel for expenses incurred in winning the plaintiff's case.

[221] 416 U.S. at 711.

[222] Panior v. Iberville Parish School Bd., 543 F.2d 1117, 1119-20 (5th Cir. 1976) (per curiam) (fees issue raised pre-*Alyeska);* Lytle v. Commissioners of Election, 541 F.2d 421, 426 (4th Cir. 1976) (same), *petition for cert. filed*, 44 U.S.L.W. 3739 (U.S. June 11, 1976) (No. 75-1797); Wallace v. House, 538 F.2d 1138, 1147-48 (5th Cir. 1976) (fees issue raised

been expanded by one court to cover cases which existed at the time fees were authorized but did not raise the question of fees until after enactment.[223] A final point concerns the extent of the award. While it is certain that the fees cover the case and an appeal on the merits,[224] the issue of prosecuting a motion or an appeal for the fee itself is undecided[225] in the context of Voting Rights Act attorneys' fees.

IV. Conclusion

The body of decisional law construing the Voting Rights Act, while not yet extensive, is growing. Recent interpretations by the Supreme Court indicate a tendency to limit the Act to the strict confines of the statutory language. While this is the more legally correct approach, it represents a significant departure from the Act's broad purposes and initial constructions. Indeed, this trend may be intended as a signal to Congress that since the Act has substantially achieved its original aims, Congress can no longer rely on the courts to seek out legislative purpose beyond the actual words of the law.[226] Even broad remedies must be sufficiently honed to produce a determinable result upon application. Despite the liberal interpretations which might be placed on *United Jewish Organizations of Williamsburgh, Inc. v. Carey*,[227] the case is more correctly placed outside the scope of voting rights and within the context

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post-*Alyeska* but pre-amendment), *cert. denied*, 97 S. Ct. 2921 (1977); Ferguson v. Winn Parish Police Jury, 528 F.2d 592, 599 (5th Cir. 1976) (fees issue on appeal when 1975 extension of the Voting Rights Act passed); Latham v. Chandler, 406 F. Supp. 754, 757 (N.D. Miss. 1976) (reversal of a pre-*Alyeska* denial of attorneys' fees).

[223] Cohen v. Maloney, 428 F. Supp. 1278, 1283 n.7 (D. Del. 1977). The question of fees would not have been pertinent until after the plaintiff prevailed at the rendition of the court's first judgment in the case on March 3, 1976. 410 F. Supp. 1147 (D. Del. 1976). Consequently, a limited *Bradley* question was not involved. The language employed in Latham v. Chandler, 406 F. Supp. 754 (N.D. Miss. 1976) is deceptively broad until the fact of an initial preamendment denial of fees is mentioned. *Id.* at 756. The statements are sufficiently clear to deduce an intention not to limit the retroactive award of fees to those cases in which the issue had been raised before the law was passed. *See id.* This is probably the better view.

[224] *E.g.*, Panior v. Iberville Parish School Bd., 543 F.2d 1117, 1119 (5th Cir. 1976) (per curiam).

[225] *Compare* Panior v. Iberville Parish School Bd., 543 F.2d 1117, 1119 n.4 (5th Cir. 1976) (per curiam) (time spent appealing inadequate award included in computation of award) *with* Cohen v. Maloney, 428 F. Supp. 1278, 1284-85 (D. Del. 1977) (no award for time spent pursuing award).

[226] The decision in United States v. Board of Comm'rs, 430 F. Supp. 786 (N.D. Ala. 1976), *prob. juris. noted*, 97 S. Ct. 2970 (1977), may answer the question decisively. If the Court construes the wording of 42 U.S.C. § 1973*l*(c)(2) (1970) literally, future voting rights plaintiffs will find their burden noticeably increased. See notes 132 through 140 and accompanying text *supra*.

[227] 430 U.S. 144 (1977).

of statutorily-mandated affirmative action. The remaining decisions, *Morris v. Gressette*,[228] *Beer v. United States*[229] and *City of Richmond v. United States*,[230] all substantiate the contention that the Court's current approach is decidedly conservative. As a result, private plaintiffs may find themselves relying increasingly on "traditional suits attacking . . . constitutionality"[231] as a means of vindicating their voting rights. The recent revival of this *Allen* concept in the *Morris* opinion[232] implies that the Court does not consider it improper to limit severely this statutory remedy. In the end, this approach, although objectionable to some, may lessen the sting felt by states subject to the Voting Rights Act who themselves claim to be the victims of discrimination.

H. M. Yoste, Jr.

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[228] 97 S. Ct. 2411 (1977).
[229] 425 U.S. 130 (1976).
[230] 422 U.S. 358 (1975).
[231] Allen v. State Bd. of Elections, 393 U.S. 544, 549-50 (1969).
[232] 97 S. Ct. at 2419-20.

THE SURFACE-MINERAL DILEMMA: A PROPOSED STANDARD FOR MISSISSIPPI

The importance of coal as an energy resource in the United States has come full circle.[1] Although approximately seventy-five per cent of the mineral energy consumed in this country comes from oil or gas,[2] the limited reserves of these two fuels prevent continued dependence on oil and gas alone to meet expanding energy requirements. In short, present discoveries of oil and gas are not keeping pace with their consumption.[3] The United States, however, does possess sufficient resources in coal and oil shale to furnish the country with energy for several centuries to come.[4]

Coal was originally produced in the United States by underground or "shaft" mining,[5] which damages rather than destroys the surface.[6] In contrast, the more recently developed technique of strip mining exposes the coal by removal of the overlaying earth, thereby completely defacing the surface.[7] "Strip mining is effected through steam shovels and bulldozers which turn up the top layer of the earth as easily as a can opener lays bare the contents of a box of sardines."[8]

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[1] Actual coal production in the United States for 1973 totalled 599 million tons. In comparison, recent projections suggest that annual United States production figures will run at least as high as 1,300 million tons by 1990, and may be as high as 2,803 million tons. Lesistritz & Voelker, *Coal Resource Ownership: Patterns, Problems, and Suggested Solutions,* 15 NAT. RESOURCES J. 643, 643 (1975), *citing* FEDERAL ENERGY ADMINISTRATION, PROJECT INDEPENDENCE BLUEPRINT, FINAL TASK FORCE REPORT—COAL 16 (1974).

[2] Bagge, *Coal and the Environment,* 4 NAT. RESOURCES LAW. 790, 791 (1971).

[3] *Id.* Nearly one-fourth of the oil consumed in the United States comes from foreign markets at a cost of approximately $3 billion a year. *Id.* at 792.

[4] *Id.* at 794. In Mississippi the surface is underlain with lignite, an immature form of bituminous coal which is often mistaken for coal. E. LOWE, CONSTITUTION OF THE EARTH 104 (Miss. Geological Survey, Bull. No. 20, 1925). "Lignite has been found in more than twenty counties of the State, most of the known outcrops being in the Wilcox Group of north central Mississippi." *Id.* at 106. *See also* A. BICKER, ECONOMIC MINERALS OF MISSISSIPPI 63 (Miss. Geological Survey, Bull. No. 112, 1970). Although recognizing this distinction, the terms "coal" and "lignite" will be used interchangeably in this Comment as the problems of ownership and extraction of both are similar.

[5] *See generally* P. FLAWN, MINERAL RESOURCES 523 (1966).

[6] *Id.* In Rochez Bros., Inc. v. Duricka, 374 Pa. 262, 97 A.2d 825 (1953), the court distinguished strip mining and shaft mining as follows:

> Strip mining, as the term indicates, is the stripping away of the earth surface and the horizontal withdrawal of the mineral deposits at hand. Shaft mining involves the sinking of a vertical shaft into the ground and the developing from that point of tunnels and galleries which serve as vantage points from which to withdraw and lift the coal deposits through the shaft. Shaft mining does a minimum of damage to the outer crust of the earth; strip mining does a maximum of damage.

Id. at 265, 97 A.2d at 826 (1953).

[7] U.S. DEP'T OF THE INTERIOR, SURFACE MINING AND OUR ENVIRONMENT 33 (1967).

[8] Rochez Bros., Inc. v. Duricka, 374 Pa. 262, 265, 97 A.2d 825, 826 (1953).

The arrival of the energy crisis, coupled with the increasing use of strip mining by mineral operators, has resulted in fresh litigation over instruments concerning the ownership of coal. Most disputes arise from the fact that a grant or reservation of the mineral estate typically is phrased in terms such as "oil, gas and other minerals."[9] The question thus framed is whether coal will be included within the phrase "other minerals" as a part of the mineral estate or will remain an increment of the surface estate.

The answer to this question cannot be found by resort to any broad scientific definition of the word "minerals."[10] In *Puget Mill Co. v. Duecy*,[11] for example, the Washington Supreme Court reasoned that since a broad definition of "minerals" would include anything not animal or vegetable, and would even embrace the soil, such a definition would be absurd when applied to a grant of land—the reservation of minerals would be as broad as the grant.[12] Rejecting arbitrary definitions, the courts have developed the well-settled rule that the intent of the parties to an instrument should determine whether a particular substance is included in a grant or reservation of "oil, gas and other minerals."[13]

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[9] *E.g.*, Union Producing Co. v. Pittman, 245 Miss. 427, 432-34, 146 So. 2d 553, 555 (1962); Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 821 (Tex. 1972); Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971).

[10] *E.g.*, Bumpus v. United States, 325 F.2d 264, 266 (10th Cir. 1963); United States v. Harris, 115 F.2d 343, 344 (5th Cir. 1940); Holloway Gravel Co. v. McKowen, 200 La. 917, 923-24, 9 So. 2d 228, 231 (1942); Beury v. Shelton, 151 Va. 28, 37, 144 S.E. 629, 632 (1928).

> "It is true that in classifying things as animal, vegetable and mineral, everything that goes to make up the earth comes within the general classification of minerals. But this general classification cannot be used for the interpretation of instruments granting specific rights. With respect to that matter the term 'mineral' is not a definite one capable of universal application."

Davis v. Plunkett, 187 Kan. 121, 353 P.2d 514, 516 (1960), *quoting* Hans v. Great Bend Brick & Tile Co., 172 Kan. 478, 482-83, 241 P.2d 475, 478 (1952).

[11] 1 Wash. 2d 421, 96 P.2d 571 (1939).

[12] 96 P.2d at 573.

[13] *E.g.*, Besing v. Ohio Valley Coal Co., 155 Ind. App. 527, 293 N.E.2d 510, 512-13 (Ct. App. 1973) (ambiguous deed required parol evidence for determination of the intent of the parties); Davis v. Plunkett, 187 Kan. 121, 353 P.2d 514, 516 (1960) ("Mining lease" included only volcanic ash and gypsum when interpreted in light of parties' conduct); Atwood v. Rodman, 355 S.W.2d 206, 211 (Tex. Ct. App. 1962) (intent was determinative in concluding that conveyance of "oil, gas and other minerals" did not include limestone, caliche or surface shale); Western Dev. Co. v. Nell, 4 Utah 2d 112, 288 P.2d 452, 454 (1955) (courts will not apply arbitrary rules of construction if intent can be ascertained from the instrument); Buery v. Shelton, 151 Va. 28, 39, 144 S.E. 629, 632 (1928) (scope of the term "minerals" determined by intent behind the grant). *See generally* 3 AMERICAN LAW OF PROPERTY § 12.89 (A. Casner ed. 1952); 1A OIL AND GAS § 135 (W. Summers ed. 1954).

> [T]he question to be determined is: What was the intention of the parties to the deeds at the times they were made? Did the grantors understand at that time that [the particular substances] were minerals and would pass with the other minerals named in the conveyances; and did they intend to convey the [substance]? In other words, did the minds of the parties to the conveyances meet upon the questions? Did the one understand that he was conveying, and the other that he was purchasing, the [particular mineral] thereunder?[14]

I. Specific Intent

A. Unambiguous Instruments

Where the deed is unambiguous on its face, the courts have held that extrinsic evidence may not be considered and the parties' intentions must be gleaned from the four corners of the instrument.[15] In *Schreier v. Chicago & Northwestern Ry.*,[16] the grantee in a conveyance of "all coal and other minerals" subsequently executed an oil and gas lease over the objections of the owners of the real estate.[17] The Illinois Supreme Court disagreed with the landowners' contention that oil and gas were not included in the grant, holding that the words "coal and other minerals" have a settled legal meaning which includes oil and gas. The parties' intention therefore was shown within the four corners of the instrument, precluding resort to extrinsic evidence[18] that coal was the only mineral being produced in the area at the time of the conveyance[19] and that such a construction would irreparably injure the landowners' interest in the surface estate.[20] Similarly, in *Burdette v. Bruen*,[21] a deed had reserved "all coal, iron and minerals."[22] When the heirs of the original grantor executed an oil and gas lease on the property, the surface owner objected, contending that oil and gas were not covered by the reservation.[23] The Supreme Court of West Virginia, however, found the

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[14] McKinney's Heirs v. Central Ky. Natural Gas Co., 134 Ky. 239, 120 S.W. 314, 315 (1909).

[15] New Mexico & Ariz. Land Co. v. Elkins, 137 F. Supp. 767, 770-71 (D.N.M.), *appeal dismissed*, 239 F.2d 645 (10th Cir. 1956); Schreier v. Chicago & Nw. Ry., 96 Ill. App. 2d 425, 239 N.E.2d 281, 284 (1968); Maynard v. McHenry, 271 Ky. 642, 113 S.W.2d 13, 14 (1938); Sumter Lumber Co. v. Skipper, 183 Miss. 595, 608, 184 So. 296, 298 (1938) (en banc); Burdette v. Bruen, 118 W. Va. 624, 191 S.E. 360, 362 (1937); Dawson v. Meike, 508 P.2d 15, 18 (Wyo. 1973).

[16] 96 Ill. App. 2d 425, 239 N.E.2d 281 (1968).

[17] 239 N.E.2d at 282.

[18] *Id.* at 284.

[19] *Id.*

[20] *Id.*

[21] 118 W. Va. 624, 191 S.E. 360 (1937).

[22] 191 S.E. at 360.

[23] *Id.*

language to be unambiguous and held that the oil and gas were properly reserved by the language in the deed.[24] If the grantor had intended only to reserve coal and iron, he had no reason to attach the additional words "and minerals." His obvious intent, therefore, was to reserve other minerals such as oil and gas.[25] Nevertheless, conflicts have arisen. The United States District Court for New Mexico, for example, has held that a reservation of "all oil, gas and minerals" unequivocally included uranium, making extrinsic evidence of the parties' intent inadmissible,[26] while the Supreme Court of Wyoming has construed a similar reservation not to include uranium, thereby excluding other evidence.[27]

In seeking to determine whether an instrument is unambiguous, the courts will not restrict their inquiry to the language of the granting clause, but will examine the instrument as a whole to ascertain the parties' intent.[28] For instance, in *Wulf v. Shultz*,[29] the plaintiffs sought a declaratory judgment as to the parties' rights under an instrument entitled "OIL AND GAS LEASE"[30] which granted the defendant the right to "natural gas, petroleum and other mineral substances."[31] The defendant, however, sought to quarry limestone which would have caused substantial damage to the surface.[32] Considering the entire lease, the Kansas Supreme Court concluded that the parties had intended at the time of the conveyance to restrict the lease to the recovery of oil and gas.[33] The court found the title of the lease to be a limiting factor, reasoning that if the parties had intended to have more than an oil and gas lease, they would have broadened the title of the instrument.[34]

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[24] *Id.* at 361.

[25] *Id. But cf.* Panhandle Co-op. Royalty Co. v. Cunningham, 495 P.2d 108, 113 (Okla. 1971) ("and other minerals" meant those minerals produced as oil or gas or as a component or constituent thereof).

[26] New Mexico & Ariz. Land Co. v. Elkins, 137 F. Supp. 767, 770-71 (D.N.M.), *appeal dismissed*, 239 F.2d 645 (10th Cir. 1956).

[27] Dawson v. Meike, 508 P.2d 15, 18 (Wyo. 1973).

[28] Wulf v. Shultz, 508 P.2d 896, 900 (Kan. 1973); Rock House Fork Land Co. v. Raleigh Brick & Tile Co., 83 W. Va. 20, 97 S.E. 684, 686 (1918).

[29] 508 P.2d 896 (Kan. 1973).

[30] *Id.* at 898-99.

[31] *Id.* at 899.

[32] *Id.* at 900.

[33] *Id.*

[34] *Id.*

> In construing a lease . . . it is proper to consider the form of the instrument in its entirety, including the title assigned to it by the parties, to resolve the issue.
>
> Here the entire lease is couched in terms of oil and gas, those substances dominating the attention of the parties when the lease was executed.

Id.

B. Ambiguous Instruments

When an instrument is ambiguous as to whether the parties intended to include a certain substance in the mineral or surface estate, resort to extrinsic evidence is proper to determine intent.[35] The rule adopted by the Supreme Court of Mississippi in *Sumter Lumber Co. v. Skipper*[36] clearly indicates the guidelines to be followed in determining the parties' intentions.

> When the language of the deed or contract is clear, definite, explicit, harmonious in all its provisions, and free from ambiguity throughout, the court looks solely to the language used in the instrument itself, and will give effect to each and all its parts as written. When, however, the language falls short of the qualities above mentioned and resort must be had to extrinsic aid, the court will look to the subject matter embraced therein, to the particular situation of the parties who made the instrument, and to the general situation touching the subject matter, that is to say, to all the conditions surrounding the parties at the time of the execution of the instrument, and to what . . . they had in contemplation in respect to all such said surrounding conditions, giving weight also to the future developments thereinabout which were reasonably to be anticipated or expected by them . . . .[37]

Thus, when extrinsic evidence must be relied upon to determine the parties' intent, the court will consider the circumstances surrounding the conveyance and employ various rules of construction to aid in its determination.[38]

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[35] Besing v. Ohio Valley Coal Co., 155 Ind. App. 527, 293 N.E.2d 510, 513 (Ct. App. 1973); Davis v. Plunkett, 187 Kan. 121, 353 P.2d 514, 516 (1960); McKinney's Heirs v. Central Ky. Natural Gas Co., 134 Ky. 239, 120 S.W. 314, 315 (1909); Sumter Lumber Co. v. Skipper, 183 Miss. 595, 608, 184 So. 296, 298 (1938) (en banc); Western Dev. Co. v. Nell, 4 Utah 2d 112, 288 P.2d 452, 454 (1955); Beury v. Shelton, 151 Va. 28, 39, 144 S.E. 629, 632 (1928); Rock House Fork Land Co. v. Raleigh Brick & Tile Co., 83 W. Va. 20, 97 S.E. 684, 685-86 (1919); Dawson v. Meike, 508 P.2d 15, 18 (Wyo. 1973).

[36] 183 Miss. 595, 184 So. 296 (1938) (en banc).

[37] *Id.* at 608, 184 So. at 298.

[38] The most commonly applied tests are: (1) surface destruction as a factor, *e.g.*, Carson v. Missouri Pac. R.R., 212 Ark. 963, 209 S.W.2d 97, 99 (1948), see notes 53, 86, 93, 102, 118 & 134 and accompanying text *infra*; (2) community knowledge of the mineral's existence at the time of the transaction, *e.g.*, Missouri Pac. R.R. v. Strohacker, 202 Ark. 645, 152 S.W.2d 557, 562-63 (1941), see notes 39 through 48 and accompanying text *infra*; (3) construction against the grantor, *e.g.*, Holloway Gravel Co. v. McKowen, 200 La. 917, 931, 9 So. 2d 228, 233 (1942), see notes 82 through 88 and accompanying text *infra*; (4) rule of practical construction, *e.g.*, Cummings v. Midstates Oil Corp., 193 Miss. 675, 697, 9 So. 2d 648, 652 (1942), see notes 64 through 75 and accompanying text *infra*; (5) ejusdem generis rule, *e.g.*, Vogel v. Cobb, 193 Okla. 64, 141 P.2d 276, 280 (1943), see notes 76 through 81 and accompanying text *infra*; and (6) requirement that the substance have special value, *e.g.*, Heinatz v. Allen, 147 Tex. 512, 217 S.W.2d 994, 997 (1949), see notes 49 through 63 and accompanying text *infra*.

1. Common Recognition of the Substance as a Mineral

One factor to be considered is whether the substance in question was a commonly recognized mineral in the particular area at the time of the conveyance.[39] For example, the Supreme Court of Ohio has concluded that a grant of "all the coal of every variety, and all the iron ore, fire clay, and other valuable minerals" did not convey title to the oil and gas.[40] The deed must be construed in light of the oil developments as they existed in the particular vicinity at the time the deed was drawn.[41] Although oil was then being produced in small quantities approximately ten to twenty miles away,[42] there was no evidence that the parties had knowledge to that effect.[43] More recently, in *Thomas v. Markham & Brown, Inc.*,[44] a federal district court in Arkansas held that "pulaskite"[45] was not considered a mineral according to common speech and usage[46] at the time the instrument was executed.[47] The court noted that mere proof that a valuable substance is in the ground and that its presence is well known does not make the substance a "mineral" for purposes of construing the instrument.[48]

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[39] *See, e.g.*, Thomas v. Markham & Brown, Inc., 353 F. Supp. 498, 501 (E.D. Ark. 1973) (pulaskite not generally regarded as a mineral in the county in 1953); Ahne v. Reinhart & Donovan Co., 240 Ark. 680, 401 S.W.2d 565, 569 (1966) (gas commonly regarded as a mineral in the county in 1905); Stegall v. Bugh, 310 S.W.2d 251, 253 (Ark. 1958) (the term "mineral" did not encompass oil and gas in the county in 1900); Carson v. Missouri Pac. R.R., 212 Ark. 963, 209 S.W.2d 97, 99 (1948) (bauxite not considered a mineral in the area in 1892); Missouri Pac. R.R. v. Strohacker, 202 Ark. 645, 152 S.W.2d 557, 562-63 (1941) (oil and gas not regarded as minerals in the county in 1899); Deer Lake Co. v. Michigan Land & Iron Co., 89 Mich. 180, 50 N.W. 807, 809 (1891) (marble or sepentine deposits not generally known as "minerals" in the area in 1884); Cole v. Berry, 245 Miss. 359, 147 So. 2d 306 (1962) (bentonite was considered a mineral in the area in 1945); Detlor v. Holland, 57 Ohio St. 492, 49 N.E. 690, 692 (1898) (parties were unaware oil was on property at time of transaction); *cf.* Cain v. Neumann, 316 S.W.2d 915, 922 (Tex. Ct. App. 1958) (conveyance of "all minerals" precluded evidence of parties' knowledge of uranium). *See also* Farrell v. Sayre, 129 Colo. 368, 270 P.2d 190, 193 (1954) (gravel and sand, as part of the surface, were not "minerals" unless specifically reserved); Psencik v. Wessels, 205 S.W.2d 658, 661 (Tex. Ct. App. 1947) ("mineral" did not include commercial gravel in conveyance of farm lands).

[40] Detlor v. Holland, 57 Ohio St. 492, 49 N.E. 690 (1898).

[41] 49 N.E. at 692-93.

[42] *Id.* at 692.

[43] *Id.*

[44] 353 F. Supp. 498 (E.D. Ark. 1973).

[45] Pulaskite is a form of granite, so named because of its presence in Pulaski County, Arkansas. *Id.* at 499.

[46] *Id.* at 500-01.

[47] *Id.* at 501.

[48] *Id.* Rather, the mineral owner must go further and establish that at the time of the conveyance the substance was generally regarded as a mineral and that in the common

2. Exceptional Characteristics Giving Special Value

Another factor that several jurisdictions have weighed in determining intent is whether the substance involved either possesses some characteristic giving it special value or is so closely related to the soil that it is considered a part of the soil.[49] For example in *Heinatz v. Allen*,[50] a dispute over whether limestone was included in a grant of the "mineral rights," the Texas Supreme Court determined that substances such as sand, gravel and limestone are not minerals unless they are exceptional in character and possess some peculiar property giving them special value.[51] Specifically, "[s]uch substances, when they are useful only for building and road-making purposes, are not regarded as minerals in the ordinary and generally accepted meaning of the word."[52] An additional reason for the court's conclusion that limestone remains with the surface estate was that limestone is recoverable only by open pit mining which destroys the surface.[53] Although this factor was not decisive, the court stated that it should nevertheless be considered.[54] In a similar case,[55] the Colorado Supreme Court held that a reservation of "minerals" did not include surface sand and gravel since the entire surface area involved was composed of those substances. In light of this fact, the parties could not have intended to nullify the grant of surface rights without direct specification to that effect.[56] The court found two circumstances controlling: the sand and gravel had no exceptional characteristics giving it special value,[57] and neither sand nor gravel was considered to be a mineral in the particular area at the time of the conveyance.[58] Likewise, in New Mexico,[59] landowners appealed a condemnation ruling which determined that road-building materials had been reserved to the govern-

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or commercial speech of the area the term "mineral" included the disputed substance. *Id.*

[49] *See, e.g.*, Farrell v. Sayre, 129 Colo. 368, 270 P.2d 190, 193 (1954) (sand and gravel found to have no exceptional value or character); State Highway Comm'n v. Trujillo, 82 N.M. 694, 487 P.2d 122, 124 (1971) (rock has no exceptional character); Robinson v. Robbins Petroleum Corp., 510 S.W.2d 865, 866-67 (Tex. 1973) (salt water found to be part of surface estate since it was closely related to the surface); Elridge v. Edmondson, 252 S.W. 2d 605, 607 (Tex. Ct. App. 1952) (limestone has no special value to qualify it as a mineral).

[50] 147 Tex. 512, 217 S.W.2d 994 (1949).

[51] 217 S.W.2d at 997.

[52] *Id.*

[53] *Id.* at 998.

[54] *Id.*

[55] Farrell v. Sayre, 129 Colo. 368, 270 P.2d 190 (1954).

[56] 270 P.2d at 192.

[57] *Id.* at 193.

[58] *Id.*

[59] State Highway Comm'n v. Trujillo, 82 N.M. 694, 487 P.2d 122 (1971).

ment in the patents[60] and that the highway commission was therefore not required to compensate the owners for the taking.[61] The court found that since the rock in question had no rare or exceptional qualities giving it special value and was useful only for building roads,[62] the rock had not been reserved as a mineral and the government was required to compensate for its taking.[63]

3. The Rule of Practical Construction

A third aid often employed by the courts in their search for intent is the rule of practical construction.[64] Under this rule, an ambiguous instrument may be made certain by subsequent actions of the parties which indicate their personal interpretations of the language.[65] Where the meaning of an instrument is indefinite, the interpretation given to it by the parties is to be accorded great, if not controlling, influence.[66] In *United States v. 1,253.14 Acres of Land*,[67] the grantors, who had long been engaged in construction and gravel operations, reserved a one-half interest in "all minerals."[68] The grantee subsequently wrote a letter to the grantors which indicated that the parties had intended to include sand and gravel within the term "all minerals."[69] Under the rule of practical construction, the United States Court of Appeals for the Tenth Circuit found that the parties had thereby construed the reservation to include sand and gravel.[70] The rule was also applied in *Monon Coal Co.*

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[60] The patents reserved to the United States "all the coal and other minerals." 487 P.2d at 122.

[61] *Id.*

[62] *Id.* at 124.

[63] *Id.* at 126.

[64] *See, e.g.*, United States v. 1,253.14 Acres of Land, 455 F.2d 1177, 1180 (10th Cir. 1972) (action of parties indicated mineral reservation included sand and gravel); Whitebird v. Eagle-Picker Co., 390 F.2d 831, 835-36 (10th Cir. 1968) (conduct of parties mandated holding that lessor was not entitled to royalties on by-products of ore); Monon Coal Co. v. Riggs, 115 Ind. App. 236, 56 N.E.2d 672, 674 (1944) (grantee's allowing grantor to drill for oil indicated intent that oil and gas rights remain with grantor); Cummings v. Midstates Oil Corp., 193 Miss. 675, 697, 9 So. 2d 648, 652 (1942) (reservation of 10 acres in lease nullified by conduct of parties); Sumter Lumber Co. v. Skipper, 183 Miss. 595, 608-09, 184 So. 296, 298-99 (1938) (en banc) (parties' actions extended contract past termination date). *See also* Sheridan Oil Co. v. Cunningham, 186 Okla. 618, 99 P.2d 497 (1940) (parties' actions indicated casing-head gas was included in ambiguous contract).

[65] *E.g.*, Cummings v. Midstates Oil Corp., 193 Miss. 675, 697, 9 So. 2d 648, 652 (1942).

[66] *Id.*

[67] 455 F.2d 1177 (10th Cir. 1972).

[68] *Id.* at 1179.

[69] *Id.* at 1180.

[70] *Id.* "[I]t is an accepted rule of construction and interpretation of contracts that the meaning adopted should be in harmony with that meaning indicated by the actions of the parties . . . ." *Id.*

v. Riggs,[71] an Indiana case where, at the time of the conveyance, the original grantee was engaged exclusively in coal mining and had never explored for oil and gas in the county.[72] Not only had negotiations prior to the execution of the instrument concerned only coal rights without mention of oil and gas,[73] but the grantee also had permitted the grantor to drill for oil on the land.[74] In light of these facts, the court concluded that under the rule of practical construction, the parties had intended that the oil and gas rights should remain with the grantor.[75]

4. The Ejusdem Generis Rule

Rather than interpret ambiguous agreements by exploring extraneous facts, some courts have held that the doctrine of ejusdem generis applies to phrases such as "oil, gas and other minerals."[76] The rule may be simply stated as follows: "[W]here general words follow particular words in an enumeration describing the subject matter, general words are construed to embrace only objects similar in nature to those enumerated by antecedent specific words."[77] Thus, in *Allen v. Farmers Union Co-operative Royalty Co.*,[78] the Oklahoma Supreme Court held that "all oil, gas and other minerals" applied only to oil, gas and minerals produced as a component thereof and not to any types of metallic ores or minerals.[79] Applying the ejusdem generis rule to the phrase "iron, coal, and other minerals," the Louisiana Supreme Court, in *Huie Hodge Lumber Co. v. Railroad Lands Co.*,[80] concluded that the words "other minerals" must be construed as intending to reserve only minerals similar in character to coal and iron and not including oil and gas.[81]

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[71] 115 Ind. App. 236, 56 N.E.2d 672 (1944).

[72] 56 N.E.2d at 674.

[73] *Id.*

[74] *Id.* The subsequent grantee had also permitted the grantor to drill for oil on the premises. *Id.*

[75] *Id.*

[76] *See, e.g.*, Keller v. Ely, 192 Kan. 698, 391 P.2d 132, 134-35 (1964) ("all gas, oil and mineral rights" does not include gypsum rock); Huie Hodge Lumber Co. v. Railroad Lands Co., 151 La. 197, 91 So. 676, 677 (1922) ("iron, coal and other minerals" does not include petroleum gas); Allen v. Farmers Union Co-op. Royalty Co., 538 P.2d 204, 208 (Okla. 1975) ("all oil, gas and other minerals" does not include metallic ores or minerals); Cronkhite v. Falkenstein, 352 P.2d 396, 399 (Okla. 1960) ("oil, gas and other minerals" does not include gypsum rock); Vogel v. Cobb, 193 Okla. 64, 141 P.2d 276, 280 (1943) (subterranean waters not encompassed by "oil, petroleum, gas, coal, asphalt and all other minerals").

[77] Keller v. Ely, 192 Kan. 698, 391 P.2d 132, 135 (1964).

[78] 538 P.2d 204 (Okla. 1975).

[79] *Id.* at 208.

[80] 151 La. 197, 91 So. 676 (1922).

[81] 91 So. at 677. In reaching its conclusion, the court distinguished solid minerals which are removed by mining from minerals such as oil and gas which are removed by drilling. *Id.*

5. Construction Against the Grantor

A fifth rule of construction applied generally by the courts is the principle that the language of a deed should be construed most strongly against the grantor, who presumptively controls the wording of the instrument.[82] Under this rule, the Supreme Court of Kansas held that a grantor's reservation of "all of the oil, gas, casing-head gas and other liquid semi-solid and solid minerals" did not reserve gypsum.[83] A similar result obtained in *Beury v. Shelton*,[84] a Virginia case, where the court relied on two specific factors in determining that limestone was not included within the exception of "all the metals and minerals of every kind and character."[85] First, the entire area covered by the deed was underlain with limestone which, if removed by quarrying, would have completely destroyed the surface.[86] Second, the court construed the language of the deed most strongly against the grantor, reasoning that if the grantor had intended to except limestone, he would have expressly done so, particularly since the rest of the instrument appeared to be carefully prepared.[87]

Of course, once a determination is made that extrinsic evidence is necessary to determine the parties' intent, the court is not restricted to consideration of one particular circumstance or rule of construction. Indeed, it is not unusual for a court to run the gamut of extrinsic aids in an effort to discover the intent of the parties.[88]

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[82] *See, e.g.*, Keller v. Ely, 192 Kan. 698, 319 P.2d 132, 135-36 (1964) (strict construction against grantor who reserved "mineral rights" and subsequently wished to mine gypsum rock); Wilkes-Barre Township School Dist. v. Corgan, 403 Pa. 383, 387, 170 A.2d 97, 99-100 (1961) (strict construction of deed reserving mineral and removal rights allowed grantee to recover damages caused by grantor's strip mining); Beury v. Shelton, 151 Va. 28, 41, 144 S.E. 629, 633 (1928) (grantor who reserved "such minerals as are secured by the ordinary processes of mining" could not mine limestone).

[83] Keller v. Ely, 192 Kan. 698, 391 P.2d 132, 136 (1964).

[84] 151 Va. 28, 144 S.E. 629 (1928).

[85] *Id.* at 31, 144 S.E. at 632-33.

[86] *Id.* at 41, 144 S.E. at 633.

[87] *Id.*

[88] *See, e.g.*, Holloway Gravel Co. v. McKowen, 200 La. 917, 9 So. 2d 228, 230-34 (1942) (special value of the substance, ejusdem generis, surface destruction, presumption against grantor, community knowledge of existence of a mineral, rule of practical construction); Vang v. Mount, 300 Minn. 393, 220 N.W.2d 498, 500-02 (1974) (special value of the substance, surface destruction, community knowledge of existence of mineral); Fleming Foundation v. Texaco, 337 S.W.2d 846, 850-52 (Tex. Ct. App. 1960) (presumption against grantor, ejusdem generis, community knowledge of existence of mineral); West Va. Dep't of Highways v. Farmer, 226 S.E.2d 717, 719-20 (W. Va. 1976) (presumption against grantor, ejusdem generis, rule of practical construction, surface destruction).

C. *Specific Intent in Mississippi*

The Mississippi Supreme Court has considered four major cases in which it has felt compelled to ascertain whether a particular substance was specifically intended by the parties to be severed from the surface estate.[89] In *Moss v. Jourdan,*[90] where "all minerals that may be on the . . . land" were severed from the surface estate, a controversy arose between the mineral owner and the surface owner over the title to sand and gravel.[91] The court found that sand and gravel are increments of the mineral estate,[92] but held that since they cannot be removed without destroying the surface, the mineral owner could not remove them in the absence of a contrary agreement.[93]

The court departed from *Moss* in *Witherspoon v. Campbell,*[94] where the grantor had reserved "all minerals now owned by me of every kind and nature, both liquid and solid, with the right of ingress and egress, and all necessary rights for the exploration and development of the same."[95] When the grantee later arranged for the excavation of gravel on certain land in the grant, the grantor sued to enjoin the excavation.[96] The court overruled *Moss,*[97] concluding that gravel is not included in the term "mineral" without a specific designation to that effect.[98] In resolving the parties' intent, however, the court relied on numerous circumstances and rules of construction.

Applying the rule of practical construction,[99] the court first noted that prior to the suit the grantor had exercised no right over the gravel.[100] In addition, the grantee had paid the taxes on the land without separate assessment of the gravel in favor of the grantor, indicating that the parties had not intended that the gravel be reserved.[101] Moreover, the grantor knew that there was gravel on the land at the time the deed was

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[89] Singer v. Tatum, 251 Miss. 661, 171 So. 2d 134, *cert. denied*, 382 U.S. 845 (1965); Cole v. McDonald, 236 Miss. 168, 109 So. 2d 628 (1959); Witherspoon v. Campbell, 219 Miss. 640, 69 So. 2d 384 (1954); Moss v. Jourdan, 129 Miss. 598, 92 So. 689 (1922).

[90] 129 Miss. 598, 92 So. 689 (1922).

[91] *Id.* at 612, 92 So. at 689-90.

[92] *Id.*, 92 So. at 690.

[93] *Id.* at 613, 92 So. at 690. "Where one person owns the surface of land and another the mineral therein, the owner of the mineral may remove it from the land, but in so doing he must allow sufficient of the subjacent land to remain to support the surface in its natural state." *Id.*

[94] 219 Miss. 640, 69 So. 2d 384 (1954).

[95] *Id.* at 643-44, 69 So. 2d at 385.

[96] *Id.* at 644, 69 So. 2d at 385.

[97] *Id.* at 652, 69 So. 2d at 389.

[98] *Id.* at 650, 69 So. 2d at 388.

[99] See section I. *B.* 3. *supra.*

[100] 219 Miss. at 644, 69 So. 2d at 385.

[101] *Id.*

executed and that the open pit mining necessary to remove the gravel would result in destruction of the surface.[102] Yet, even with this knowledge, the grantor still failed to specifically mention gravel in preparing both the deed[103] and a subsequent deed of correction.[104] Accordingly, the presumption that the grantor controls the language of the deed[105] led to the finding that the grantor would have included gravel specifically had he intended to reserve it.

The court also looked to the understanding in the community at the time of execution to construe the term "minerals."[106] Since the first oil field in Mississippi had been discovered in the same county five years before the execution of the *Witherspoon* deed,[107] the court concluded that the community customarily defined "minerals" as oil, gas and other similar minerals as distinguished from sand and gravel.[108] The additional facts that the grantor was not engaged in a business for which gravel would be useful and that the land was conveyed to the grantee for farming purposes, reenforced the position that the parties intended the gravel to remain with the surface.[109] Thus, since the gravel could only be removed by strip mining which would destroy the surface,[110] it could not have been within the contemplation of the parties that the mineral owner should have the right to destroy or severely damage the surface by removing the gravel.[111]

Cole v. McDonald,[112] the third case in the Mississippi tetralogy, presented the question of whether bentonite was included by the phrase "oil, gas and minerals."[113] The surface owner contended that *Witherspoon*[114] required a finding that bentonite was not reserved as a "mineral."[115] The court found, however, that in these circumstances

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[102] *Id.* at 645, 69 So. 2d at 385.

[103] *Id.*

[104] A deed of correction was prepared to correct a mistake in the range number and in the date of execution and acknowledgment. *Id.*

[105] See section I. *B.* 5. *supra.*

[106] See section I. *B.* 1. *supra.*

[107] 219 Miss. at 646, 69 So. 2d at 386.

[108] *Id.* at 646-47, 69 So. 2d at 387. The court noted that *Moss* had been decided several years prior to the discovery of oil and gas in commercial quantities in the state and during a period when sand and gravel were in great demand for highway construction. Consequently, common understanding as to the meaning of "minerals" had changed substantially since *Moss. Id.* at 651, 69 So. 2d at 387-88.

[109] *Id.* at 646, 69 So. 2d at 386.

[110] See notes 147 through 151 and accompanying text *infra.*

[111] 219 Miss. at 649-50, 69 So. 2d at 388.

[112] 236 Miss. 168, 109 So. 2d 628 (1959).

[113] *Id.* at 181, 109 So. 2d at 629.

[114] 219 Miss. 640, 69 So. 2d 384 (1954). See notes 94 through 111 and accompanying text *supra.*

[115] 236 Miss. at 184, 109 So. 2d at 635. The landowner contended that according to

bentonite was a "mineral"[116] and that the surface owner's reliance on *Witherspoon* was unfounded.[117] First, while the *Witherspoon* property was so entirely underlain with gravel that removal would destroy the surface,[118] the bentonite in the instant case existed in small deposits.[119] After these deposits were strip mined, the soil could be replaced, making the land once again fit for other uses.[120] Furthermore, local custom in *Witherspoon* did not contemplate the inclusion of sand and gravel in a conveyance of "all minerals,"[121] whereas in the instant case, oil and gas were not the only minerals which had been discovered in the county prior to the execution of the instrument.[122] Indeed, publications by several local newspapers had aroused public interest in many different types of minerals.[123]

The court last addressed the question of intent in *Singer v. Tatum*,[124] where a bank had given a deed to Tatum which reserved "oil, mineral, gas, and petroleum."[125] The parties subsequently executed a mineral lease in which Tatum, as lessee, agreed to pay the bank a royalty on sulphur and any mineral other than oil, gas and casing-head gas.[126] After the bank conveyed the mineral rights "reserved from sale to W.S.F. Tatum" to a third party,[127] a dispute arose as to whether the original deed had reserved all the minerals, including sulphur and salt, or only hydrocarbons.[128] The court examined the lease and held that

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county custom, the phrase "oil, gas and other minerals" included only "other minerals" of like kind and character which are not a part of the soil; that the mineral owners were not connected with any business dealing with bentonite; that the open pit mining required to remove bentonite would destroy the surface for agricultural purposes; and that bentonite is not a mineral but a clay. *Id.* at 177, 69 So. 2d at 632. The mineral owners averred that custom in the county did indeed treat bentonite as a mineral; that the land involved was suitable only for growing timber; that bentonite is a mineral of great commercial value; and that only a small portion of the land was underlain with bentonite so that mining would not destroy the surface for the use to which it had been subjected, *i.e.* the growing of timber. *Id.* at 180, 69 So. 2d at 633.

[116] *Id.* at 183, 69 So. 2d at 635. The court held that since there was conflicting evidence as to whether or not bentonite is a mineral, the chancellor's finding in the affirmative was controlling. *Id.*

[117] *Id.* at 185, 69 So. 2d at 636.

[118] *Id.*

[119] *Id.* at 186, 69 So. 2d at 636-37.

[120] *Id.*

[121] *Id.* at 185, 69 So. 2d at 636.

[122] *Id.*

[123] *Id.* at 185-86, 60 So. 2d at 636.

[124] 251 Miss. 661, 171 So. 2d 134, *cert. denied*, 383 U.S. 845 (1965).

[125] *Id.* at 668, 171 So. 2d at 137.

[126] *Id.* at 675, 171 So. 2d at 140.

[127] *Id.* at 676, 171 So. 2d at 140.

[128] *Id.* at 676-77, 171 So. 2d at 141.

under the rule of practical construction,[129] all the minerals had been reserved by the original deed.[130] Indeed, the term "mine" was mentioned six times in the lease. Since mines are excavated only for solid minerals,[131] the lease thus included oil, gas, sulphur and other minerals[132] with a separate provision for sulphur royalties.[133] As in *Moss, Witherspoon* and *Cole,* the court emphasized the surface destruction factor, noting that in the case at bar, mining for salt and sulphur could be conducted without substantial harm to the surface.[134] Accordingly, the fact that salt and sulphur were both produced in the area at the time of the original conveyance so that the general community was aware of their existence[135] further supported the conclusion that the intent of the parties[136] in the original deed was to include all minerals, including salt and sulphur.[137]

II. General Intent

In the preceeding cases, the courts were concerned with whether the parties specifically intended that a particular mineral be classified as an element of the surface or mineral estate. Professor Eugene O. Kuntz, however, has suggested that the intention sought should not be an elusive specific intent. Instead, the general intent of the parties should be determined by examining the purposes of the grant or reservation in terms of manner of enjoyment anticipated by the resulting estates.[138] Professor Kuntz argues that the contradictions among cases concerning the ownership of a substance springs from the fact that the courts have attempted to discover an intent to include or exclude a specific substance when, in fact the parties had nothing specific in mind at all concerning the substance at the time of the transaction.[139] He proposes that the following theory be adopted to lend practicality and uniformity to a heretofore haphazard approach.

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[129] See section I. *B.* 3. *supra.*

[130] 251 Miss. at 698, 171 So. 2d at 151.

[131] *Id.* at 690, 171 So. 2d at 147.

[132] *Id.* at 689, 171 So. 2d at 147.

[133] *Id.*

[134] *Id.* at 683, 171 So. 2d at 144.

[135] *Id.*

[136] The court considered itself bound to determine the specific intent of the parties. "This Court is interested in what the [grantor] intended to convey and thought it was conveying and what [the grantee] thought [the grantor] conveyed and what he actually received." *Id.* at 696, 171 So. 2d at 150.

[137] *Id.* at 698, 171 So. 2d at 151.

[138] Kuntz, *The Law Relating to Oil and Gas in Wyoming,* 3 Wyo. L.J. 107, 112 (1949). *See also* 1 The Law of Oil and Gas § 13.3 (E. Kuntz ed. 1962).

[139] Kuntz, *supra* note 138, at 112.

> When a general grant or reservation is made of all minerals without qualifying language, it should be reasonably assumed that the parties intended to sever the entire mineral estate from the surface estate, leaving the owner of each with definite incidents of ownership enjoyable in distinctly different manners. The manner of enjoyment of the mineral estate is through extraction of valuable substances, and the enjoyment of the surface is through retention of such substances as are necessary for the use of the surface, and these respective modes of enjoyment must be considered in arriving at the proper subject matter for each estate.
>
> Applying this intention, the severance should be construed to sever from the surface all substances presently valuable in themselves, apart from the soil, whether their presence is known or not, and all substances which become valuable through development of the arts and sciences, and that nothing presently or prospectively valuable as extracted substances would be intended to be excluded from the mineral estate.
>
> A limitation upon the mineral estate should be that only those substances can be removed without compensation which can be removed without unreasonable injury to the enjoyment of the surface estate, i.e. without unreasonably interfering with the uses for which the land is adapted.[140]

To illustrate this approach, Professor Kuntz poses a hypothetical situation in which a mineral owner seeks to extract a substance by strip mining methods which would destroy the surface of the land.[141] Under this "manner of enjoyment" test, Kuntz contends that the mineral owner's exercise of his extractive rights would be contingent upon compensation to the landowner for damages to the surface.[142] Damages are to be measured not by the value of the mineral produced, but by the reduction in the value of the land for its intended use by the surface owner.[143]

The major case purporting to adopt the manner of enjoyment test is *Acker v. Guinn,*[144] where a mineral owner sought a declaratory judgment that iron ore was included in a grant of "an individual one-half interest in and to all of the oil, gas and other minerals" in and under a certain tract of land.[145] The Texas Supreme Court examined the record

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[140] *Id.* at 112-13. Professor Kuntz recognizes that it may be the parties' intent to sever only certain minerals and that this intention should be given full effect if it is specifically indicated in the instrument. *Id.* at 114. *See also* 1 THE LAW OF OIL AND GAS, *supra* note 138, at 305-06.

[141] Kuntz, *supra* note 138, at 115.

[142] *Id.*

[143] *Id.*

[144] 464 S.W.2d 348 (Tex. 1971).

[145] *Id.* at 349.

and found that iron ore had been extensively mined in the area[146] thus making it probable that iron ore was considered a mineral within the particular area. The court then noted, however, that iron ore must be extracted by strip mining which would substantially destroy or impair the value of the surface.[147] Recognizing that prior cases had attempted to determine the parties' specific intent to designate a particular substance as mineral or surface, the court declined to apply the specific intent test, opting instead for the general intent or manner of enjoyment test propounded by Professor Kuntz.[148] A sweeping statement was made to the effect that the parties to a mineral deed think of minerals as including valuable substances removed from the ground only by wells or mines because open pit mining is destructive of the surface.[149] Therefore, the court reasoned, iron ore was not included in a grant of "other minerals" under the general intent test.[150]

> It is not ordinarily contemplated, however, that the utility of the surface for agricultural or grazing purposes will be destroyed or substantially impaired. Unless the contrary intention is affirmatively and fairly expressed, therefore, a grant or reservation of "minerals" or "mineral rights" should not be construed to include a substance that must be removed by methods that will, in effect, consume or deplete the surface estate.[151]

By its broad holding that all minerals which must be strip mined are to remain with the surface estate, *Acker* places a severe limitation on the manner of enjoyment test and reaches a conclusion directly opposite from that intended by Professor Kuntz.[152] A correct application of the general intent test would restrict the *manner* of taking the mineral, not the ownership of it.[153] The test applied in *Acker* is closer to the specific intent test—with only one of the traditional criteria playing the role of a determinative—than it is to Professor Kuntz's general intent test. Furthermore, the *Acker* decision may prove to be the source of as much contradiction and confusion as the traditional specific intent test has been. The Texas Court of Appeals, for example, followed *Acker* in

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[146] *Id.* at 350.

[147] *Id.* at 351. "It is clear that the [iron] ore is a mineral with commercial value, but its production will destroy the surface over large areas wherever the deposits are mined." *Id.*

[148] *Id.* at 351-52.

[149] *Id.* at 352. The court was careful to avoid the fact that hard mineral shaft or tunnel mining may also result in destruction of the surface. *Id.* at 352 n.1.

[150] *Id.* at 352-53.

[151] *Id.* at 352.

[152] Comment, *Surface or Mineral: A Single Test?*, 23 BAYLOR L. REV. 407, 414 (1971).

[153] *Id.* at 416.

Williford v. Spies,[154] holding that a reservation of one-half of "all minerals, oil, gas and other minerals" was ineffective to reserve minerals that must be extracted by strip mining.[155] However, another Texas court[156] subsequently held that a deed reserving "a one-fourth undivided interest in and to all oil, gas and other minerals" adequately reserved all coal and lignite in the land.[157] The latter court construed *Acker* as applying only to minerals which *must* be removed by strip mining and not to those which may be so removed.[158] These conflicting interpretations illustrate that *Acker* leaves unresolved the question of whether those minerals which *may* be strip mined are increments of the surface or of the mineral estate.

In conjunction with this problem, there remains a further question concerning those minerals which may be removed by underground mining but can be economically extracted only by means of surface mining. Are these minerals to be considered minerals which must be strip mined? Taking the problem a step further, substances such as coal have been held to be a part of the surface estate. It is possible that technology will so improve in the future that coal can be economically removed by methods which do not impede surface use. Will the coal remain with the surface, or will it vacillate between surface and mineral as the tide of technology ebbs and flows? And, if the mineral must be strip mined but effective reclamation is possible, would the mineral remain with the surface estate or pass to the mineral estate? Total reclamation, it would seem, would strike a death blow to the *Acker* decision.[159]

Not only is *Acker* a springboard of confusion, but it could also result in inequitable consequences. For example, assume that a landowner is awarded title to the coal under his land because strip mining the coal would impair the surface value. The value of the coal under the land is usually many times the agricultural value of the land,[160] and it is reasonable to expect the landowner to mine the coal himself. In such a situation the mineral owner would be deprived of a valuable mineral which is rightfully his. The landowner would, in turn, be unjustly enriched at the expense of the mineral owner.

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[154] 530 S.W.2d 127 (Tex. Ct. App. 1975).

[155] *Id.* at 130.

[156] Wylie v. Reed, 538 S.W.2d 187 (Tex. Civ. App. 1976).

[157] *Id.* at 189.

[158] *Id.* "*Acker v. Guinn* . . . holds plaintiff had the burden of proving that the coal and lignite . . . *must* be removed by methods that would consume or deplete the surface." *Id.*

[159] Comment, *Lignite—Surface or Mineral? The Single Test Causes Double Trouble*, 28 BAYLOR L. REV. 287, 304 (1976).

[160] P. AVERITT, STRIPPING—COAL RESOURCES OF THE UNITED STATES (U.S. Dep't Interior, Geological Survey Bull. No. 1322, 1970).

III. Conclusion

In the past, the Mississippi Supreme Court has approached similar questions concerning sand and gravel,[161] bentonite,[162] and sulphur[163] through utilization of the specific intent test.[164] A common thread of concern running through each of those cases, however, was the possibility of surface destruction.[165] In light of this concern, it must be made clear to the court that the surface can be adequately protected without infusing the perplexity latent in *Acker* into existing Mississippi precedent. Accordingly, abandonment of the traditional specific intent test and avoidance of *Acker*'s distortion of the general intent test are submitted as the first step at reformation. A distinct alternative to these approaches exists in the true general intent test originally proposed by Professor Kuntz. Adoption of this approach would provide stability to this area of the law and strike an equitable balance between the rights of the surface owner and the mineral owner. A further advantage provided by the general intent theory lies in its certainty, a paramount consideration in mineral energy exploration and production where heavy expenditures by energy companies are necessary.[166] The specific intent test currently in use requires the title examiner to delve into the factual setting of each mineral severance and has created an aura of uncertainty[167] detrimental to the policy of promoting mineral exploration and recovery. Moreover, the rigidity of the specific intent test inhibits the production of valuable minerals, an activity which should be encouraged because of the resulting contribution to the prosperity and comfort of the community and the nation as a whole.[168] Indeed, the flexibility of the manner of enjoyment test may be its most attractive feature.[169]

Although Professor Kuntz suggests only money damages measured by the reduction in value of the land for its surface use,[170] the Mississippi Supreme Court would not be restricted to such a remedy. For example, a ruling that lignite is an increment of the mineral estate does not

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[161] Witherspoon v. Campbell, 219 Miss. 640, 69 So. 384 (1954).

[162] Cole v. McDonald, 236 Miss. 168, 109 So. 2d 628 (1959).

[163] Singer v. Tatum, 251 Miss. 661, 171 So. 2d 134, *cert. denied*, 382 U.S. 845 (1965).

[164] See section I. *C. supra.*

[165] See text accompanying notes 111, 120 & 134 *supra.*

[166] Kuntz, *supra* note 138, at 114.

[167] *Compare* New Mexico & Ariz. Land Co. v. Elkins, 137 F. Supp. 767, 771 (D.N.M. 1956) (uranium included in mineral reservation without regard to surrounding circumstances) *with* Dawson v. Meike, 508 P.2d 15, 18 (Wyo. 1973) (uranium not included in mineral reservation without regard to surrounding circumstances). See text accompanying notes 26 & 27 *supra.*

[168] Kuntz, *supra* note 138, at 114.

[169] *Id.* See text accompanying note 140 *supra.*

[170] See text accompanying notes 142 & 143 *supra.*

necessarily mandate a finding that strip mining must be permitted. The court could find that a grant of mineral rights does include lignite, yet still enjoin the mineral owner from removing it until he is willing and able to reclaim the land or until technology provides a reasonable alternative to strip mining. Such a conclusion could be supported by one of two theories.

First, it is well settled that the mineral estate is the dominant estate.[171] The mineral owner is entitled to free use of as much of the surface as is reasonably necessary, but always with due regard for the rights of the surface owner.[172] Consistent with this approach, it has been held that where the interests of the surface owner and the mineral owner conflict, a balancing of interests is required.[173] Thus, the court could find that although the mineral estate is dominant, destruction of the surface is unreasonable and may be enjoined absent assurances of reasonable reclamation.

A second option would be the court's adoption of the doctrine of subjacent support[174] to the strip mining dilemma to protect the surface owner's interest in the land. The doctrine provides that the mineral owner may extract his minerals after severance of the surface and mineral estates provided he leaves sufficient support for the surface.[175] Although traditionally applied in cases involving underground mining, the doctrine should also be applicable in the area of strip mining under the theory that the landowner's right to have the surface supported should be accompanied by an equal right to save the surface from destruction.[176] Strip mining would thus be prohibited unless the mineral owner could give assurances that the land would be effectively reclaimed. Such a construction is not entirely novel as numerous jurisdictions have applied the doctrine of subjacent support to prevent surface mining.[177] There is

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[171] *E.g.*, Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810 (Tex. 1972); Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971).

[172] *E.g.*, Union Producing Co. v. Pittman, 146 So. 2d 553, 555 (Miss. 1962); Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811 (Tex. 1972); Getty Oil Co. v. Jones, 470 S.W.2d 618, 621-22 (Tex. 1921).

[173] Humble Oil & Ref. Co. v. West, 508 S.W.2d 812, 815 (Tex. 1974).

[174] "The right to subjacent support is the right to have the surface remain supported in its natural state by the underlying strata." Comment, *The Common Law Rights to Subjacent Support and Surface Preservation*, 38 Mo. L. REV. 234, 235 (1973).

[175] *E.g.*, Barker v. Mintz, 73 Colo. 262, 215 P. 534, 535 (1923). *See also* Comment, *supra* note 174, at 236-38.

[176] Comment, *supra* note 174, at 247. *See also* Annot., 70 A.L.R.3d 416-17 (1976).

[177] *See, e.g.*, Smith v. Moore, 172 Colo. 440, 474 P.2d 794, 795 (1970) (language reserving as much of surface as necessary for mineral operations did not reserve right to destroy surface by strip mining); Barker v. Mintz, 73 Colo. 262, 215 P. 534, 535 (1923) (right to "use" surface does not excuse duty to support surface); Franklin v. Callicoat, 53 Ohio Op. 240, 119 N.E.2d 688, 694 (C.P. Lawrence County 1954) (duty to support precluded strip mining where language demonstrated parties' intent to keep surface intact).

also precedent for such an application in Mississippi.[178] Additionally, since the right to subjacent support may be waived either expressly or by implication,[179] substantial flexibility would remain with the parties. The parties could agree, either expressly or by implication, that the mineral owner will have the right to strip mine without liability for damages. Alternatively, the parties could agree that the mineral owner's right to strip mine is contingent upon compensation to the landowner for damages to the surface. In the absence of any agreement, however, the mineral owner will still own the substance, but he will not be allowed to remove it unless: (a) reasonable reclamation is possible and he is willing and able to reclaim the land, or (b) technology advances to such a state that the mineral can be removed without surface destruction.

Adoption of the general intent test together with these additional proposals will ensure an equitable result. The mineral owner will receive what he actually bargained for, and the surface owner will not be deprived of the enjoyment of the surface estate.

J. Kennedy Turner III

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[178] In *Moss*, see notes 90 through 93 and accompanying text *supra*, the court held that, in the absence of a contrary agreement, the doctrine of subjacent support prohibits removal of the mineral by the owner where the mineral cannot be removed without destroying the surface. 129 Miss. 598, 615, 92 So. 689, 691 (1922), *overruled on other grounds*, Witherspoon v. Campbell, 219 Miss. 640, 69 So. 2d 384 (1954). Because *Witherspoon* overruled *Moss* solely on the ground that sand and gravel are not minerals, the above holding should still be considered viable precedent.

[179] *See, e.g.*, Commonwealth v. Fitzmartin, 376 Pa. 390, 102 A.2d 893, 896 (1954) (waiver must be evidenced by clear language); Campbell v. Campbell, 29 Tenn. App. 651, 199 S.W.2d 931, 933 (Ct. App. 1946) (prima facie inference that right is retained without clear idication of intent to waive). *But see* Department of Forests & Parks v. George's Creek Coal & Land Co., 250 Md. 125, 242 A.2d 165, 172, *cert. denied*, 393 U.S. 935 (1968) (absence of clear intent to waive indicates intent to permit strip mining).

RECENT DECISIONS

SECURITIES REGULATION—RULE 10b-5—BREACH OF CORPORATE FIDUCIARY DUTY NOT ACTIONABLE IN THE ABSENCE OF MISREPRESENTATION, NONDISCLOSURE OR DECEPTION

Plaintiffs[1] brought an action under the Securities Exchange Act[2] seeking rescission of a merger.[3] Plaintiffs alleged that undervaluation of their shares[4] and accomplishment of a merger without business purpose or prior notice[5] constituted fraud under rule 10b-5 of the Securities and Exchange Commission regulations.[6] The district court dismissed, accepting the defendant's contention that no violation exists where full disclosure is made[7] and all statutory requirements are met.[8] The Court of Appeals for the Second Circuit reversed, accepting the

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[1] Plaintiffs, minority shareholders, held 5% of the capital stock of the Kirby Lumber Corporation, a Delaware corporation. Suit was brought on behalf of the plaintiffs as individual shareholders and for the benefit of the corporation. Santa Fe Indus., Inc. v. Green, 97 S. Ct. 1292, 1297 (1977). Defendant, Santa Fe Industries, Inc., controlled 95% of Kirby's stock through its wholly-owned subsidiary, Santa Fe Natural Resources, Inc. *Id.* at 1296 n.2.

[2] 15 U.S.C. §§ 78a to 78hh-1 (1970).

[3] Santa Fe Industries utilized Delaware's "short-form merger" statute in order to obtain 100% ownership of Kirby. DEL. CODE tit. 8, § 253 (1974). The statute allows a parent corporation owning at least 90% of the capital stock of a subsidiary to merge with the subsidiary upon approval by the parent corporation's board of directors. Approval by the minority shareholders is not required. *Id.*

[4] Although Santa Fe Industries offered the plaintiffs $150 per share, they contended that a "fraudulent" appraisal of the stock had been obtained. The plaintiffs valuation was based on the pro rata value of the physical assets which yielded a per share value of $722. 97 S. Ct. at 1297 n.5. See note 7 *infra*.

[5] The defendants notified minority shareholders of the merger on the day after the merger became effective, 97 S. Ct. at 1297, in full compliance with Delaware's short-form merger procedures which only require notice to minority shareholders within 10 days after the effective date of the merger, DEL. CODE tit. 8, § 262 (1974).

[6] Rule 10b-5 provides that:

> It shall be unlawful for any person . . .
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> (a) To employ any device, scheme, or artifice to defraud,
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> (b) To make any untrue statement of a material fact or to omit to state a material fact . . . or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1976).

[7] The notification included an information statement containing appraisals of Kirby's physical assets (at $320 million, or $640 per share) and an appraisal of the fair market value of Kirby stock (at $125 per share) by Morgan, Stanley & Co. 97 S. Ct. at 1297.

[8] Green v. Santa Fe Indus., Inc., 391 F. Supp. 849, 852-53 (S.D.N.Y. 1975), *rev'd*, 533 F.2d 1283 (2d Cir. 1976), *rev'd*, 97 S. Ct. 1292 (1977).

plaintiffs' allegations.[9] On writ of certiorari the United States Supreme Court, *held,* reversed. A breach of fiduciary duty by majority stockholders in a short-form merger does not constitute fraud under rule 10b-5 in the absence of deception, misrepresentation or nondisclosure. *Santa Fe Industries, Inc. v. Green*, 97 S. Ct. 1292 (1977).

The Securities Exchange Act of 1934[10] was enacted to eliminate abuses believed to have contributed to the stock market crash of 1929 and the ensuing depression.[11] The Act was intended to "restore investor confidence in the market by promoting full disclosure of all material facts affecting the issuance, purchase, or sale of securities and by preventing all types of fraud."[12] In 1942, the Securities and Exchange Commission promulgated rule 10b-5 under the Act's general anti-fraud provision, section 10(b).[13] Although the rule has been applied in a variety of contexts,[14] only recently has it been construed to be applicable in cases involving corporate mismanagement.[15] Mismanagement cases are based on claims that directors or majority shareholders have breached their fiduciary duty in connection with corporate transactions. Allegations of mismanagement have covered a broad range of transactions[16] including the "going-private" transaction[17] by which a corporation "freezes out" minority interests in a publicly-

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[9] 533 F.2d 1283 (2d Cir. 1976), *rev'd,* 97 S. Ct. 1292 (1977).

[10] Ch. 404, 48 Stat. 881 (codified at 15 U.S.C. §§ 78a to 78hh-1 (1970)).

[11] Loomis, *The Securities Exchange Act of 1934 and the Investment Advisor Act of 1940*, 28 GEO. WASH. L. REV. 214, 216-17 (1959).

[12] 64 GEO. L.J. 1381, 1387 (1976). For a discussion of the legislative history of the Act, see Ruder, *Civil Liability Under Rule 10b-5: Judicial Revision of Legislative Intent?*, 57 NW. U.L. REV. 627 (1963).

[13] 15 U.S.C. § 78j(b) (1970). The section provides:

> It shall be unlawful for any person . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[14] *See* SEC v. Texas Gulf Sulfur Co., 401 F.2d 833, 839-42 (2d Cir. 1968) (selective disclosure by insiders), *cert. denied,* 394 U.S. 976 (1969); Janigan v. Taylor, 344 F.2d 781, 783 (1st Cir.) (insider trading), *cert. denied,* 382 U.S. 879 (1965); Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 784-85 (2d Cir. 1951) (corporate issuance of misleading publicity); Thornton v. SEC, 171 F.2d 702, 703 (2d Cir. 1948) (manipulation of securities markets); Opper v. Hancock Sec. Corp., 250 F. Supp. 668, 670 (S.D.N.Y.) (trading), *aff'd,* 367 F.2d 157, 158 (2d Cir. 1966).

[15] The Supreme Court first recognized a private right of action in corporate mismanagement cases in Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971).

[16] *See, e.g.*, Popkin v. Bishop, 464 F.2d 714, 716-17 (2d Cir. 1972) (long-form merger); O'Neill v. Maytag, 339 F.2d 764, 766-67 (2d Cir. 1964) (mismanagement of corporate assets); Hooper v. Mountain States Sec. Corp., 282 F.2d 195, 198 (5th Cir. 1960) (sale of securities for inadequate consideration), *cert. denied,* 365 U.S. 814 (1961); New Park Mining Co. v. Cranmer, 225 F. Supp. 261, 264 (S.D.N.Y. 1963) (purchase of securities for excessive consideration).

[17] The "going-private" transaction is a fairly recent practice which evolved in response to the depressed securities markets of the 1970's. Comment, *Going Private and Rule 10b-5: The* Green *and* Marshel *Decisions*, 47 MISS. L.J. 981, 983 (1976).

held corporation such that it becomes privately owned.[18] The short-form merger is one of the means typically employed to accomplish the going-private transaction.[19] Indeed, many states have enacted short-form merger statutes allowing a corporation owning a certain percentage of a subsidiary corporation[20] to merge with the subsidiary upon approval by the parent corporation's board of directors without approval by or prior notice to the subsidiary's minority shareholders.[21] Additionally, state laws governing the procedures for corporate mergers generally provide only limited remedies to the minority shareholders confronted with a freeze out.[22] For this reason, minority shareholders in merger transactions have resorted to the federal courts in attempts to set these mergers aside by alleging corporate mismanagement violations of rule 10b-5.[23] In *Birnbaum v. Newport Steel Corp.*,[24] the Second Circuit initially blunted these attacks by narrowly defining rule 10b-5 as not directed to fraudulent mismanagement.[25] Subsequently, however, the court retracted this restrictive construction, holding that section "10b and rule 10b-5 prohibit all fraudulent schemes in connection with the purchase or sale of securities."[26]

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[18] *Id. See generally* Borden, *Going Private—Old Tort, New Tort Or No Tort*, 49 N.Y.U.L. REV. 987 (1974); Brudney, *A Note on "Going Private,"* 61 VA. L. REV. 1019 (1975); Soloman, *Going Private: Business Practices, Legal Mechanics, Judicial Standards and Proposals for Reform*, 25 BUFFALO L. REV. 141 (1975).

[19] Comment, *supra* note 17, at 986-92.

[20] Thirty-eight states have short-form merger statutes. All require at least 90% ownership by the parent corporation except Nebraska, which requires 80%. Green v. Santa Fe Indus., Inc., 533 F.2d 1283, 1299 n.1 (2d Cir. 1976) (Moore, J., dissenting), *rev'd*, 97 S. Ct. 1292 (1977).

[21] The parent corporation may eliminate the minority from holding stock in the new corporation by paying cash instead of exchanging stock for the minority's shares. 10 GA. L. REV. 1059, 1061 (1976).

[22] *See, e.g.*, Stauffer v. Standard Brands, Inc., 40 Del. Ch. 202, 178 A.2d 311, 314-15 (injunction not available for constructive fraud in a short-form merger), *aff'd*, 41 Del. Ch. 7, 187 A.2d 78 (Sup. Ct. 1962); Bruce v. E.L. Bruce Co., 40 Del. Ch. 80, 174 A.2d 29, 30 (Ch. 1961) (Delaware courts will not inquire into business purpose of a merger). *But cf.* David J. Greene & Co. v. Dunhill Int'l, Inc., 249 A.2d 427, 436 (Del. Ch. 1968) (allowing injunction against long-form merger).

[23] Frequently, the only remedy for minority shareholders alleging undervaluation of shares in a short-form merger is the state appraisal remedy. Some states have specified by statute that appraisal is the exclusive remedy. *E.g.*, CAL. CORP. CODE § 4123 (West 1955); MISS. CODE ANN. § 79-3-161 (1972); PA. STAT. ANN. tit. 15, § 1515(B) (Purdon Supp. 1977). Although Delaware does not so provide by statute, its courts have held that appraisal is the only remedy. Stauffer v. Standard Brands, Inc., 41 Del. Ch. 7, 187 A.2d 78 (Sup. Ct. 1962). *See generally* Vorenberg, *Exclusiveness of the Dissenting Shareholder's Appraisal Right*, 77 HARV. L. REV. 1189 (1964). Accurate appraisal is often difficult and may still result in an inadequate price. Brudney, *supra* note 18 at 1024 n.21. *See also* DeBono, *The Second Circuit Adopts a Business Purpose Test for Going Private:* Marshel v. AFW Corp. *and* Green v. Santa Fe Indus., Inc., 64 CALIF. L. REV. 1184, 1199-1201 (1964). See note 85 and accompanying text *infra*.

[24] 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

[25] *Id.* at 464.

[26] A.T. Brod & Co. v. Perlow, 375 F.2d 393, 397 (2d Cir. 1967). *See also* New Park

In applying the elements of a 10b-5 cause of action[27] to mismanagement cases, the courts have followed the traditional approach to 10b-5[28] by a broad interpretation of both the "purchaser-seller"[29] and "in connection with"[30] requirements. The greatest problems in applying the rule, however, stem from the requirement of deception.[31] Although subsection (b) of rule 10b-5 refers specifically to misrepresentation and nondisclosure,[32] subsections (a) and (c) both refer to "devices" or "acts" to defraud.[33] Thus 10b-5 could arguably be viewed as prohibiting a broader range of misconduct than deception because of this spe-

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Mining Co. v. Cranmer, 225 F. Supp. 261 (S.D.N.Y. 1963); Pettit v. American Stock Exch., 217 F. Supp. 21 (S.D.N.Y. 1963).

[27] Courts generally recognize three major elements of a 10b-5 cause of action: (1) the plaintiff must be a purchaser or seller of securities, *e.g.*, Birnbaum v. Newport Steel Corp., 193 F.2d 461, 464 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952), *cited with approval in* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975); (2) the challenged transaction must be "in connection with" the purchase or sale of a security, *compare* Birnbaum v. Newport Steel Corp., 193 F.2d 461, 463 (2d Cir.) (approving the standard), *cert. denied*, 343 U.S. 956 (1952) *with* Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971) (relaxing the condition since activities "touching" a securities transaction are sufficient to satisfy the requirement); and (3) the requirement of deception, which has caused the primary controversy in 10b-5 mismanagement cases, see notes 31 through 62 *infra*.

[28] Until recently, there had been a continuing trend expanding the scope of rule 10b-5. In Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971), the Supreme Court declared that § 10(b) should be read flexibly and should allow a cause of action for any plaintiff who suffers damages from deceptive practices in connection with the purchase or sale of securities. *Id.* at 12-13; *see, e.g.*, Affiliated Ute Citizens v. United States, 406 U.S. 128, 152-53 (1972) (misrepresentation actionable without reliance); Mitchell v. Texas Gulf Sulfur Co., 446 F.2d 90, 97 (10th Cir.) (facts which affect judgment are material), *cert. denied*, 404 U.S. 1004 (1971). *But see* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976) (requiring scienter for 10b-5 cause of action).

[29] *See* SEC v. National Sec., Inc., 393 U.S. 453, 464-68 (1969) ("purchase or sale" includes an exchange); Rekant v. Desser, 425 F.2d 872, 877 (5th Cir. 1970) (corporation issuing its own shares is a seller). *But see* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749-55 (1975) (no sale or purchase where plaintiffs declined offer of stock pursuant to court order).

[30] *See* Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971) (activities touching a securities transaction sufficient); Drachman v. Harvey, 453 F.2d 722, 737 (2d Cir. 1972) (conspiracy of buying corporation with controlling shareholders meets requirement).

[31] Although the courts have focused primarily on the necessity for deception, one series of cases has required reliance to establish a 10b-5 case. *See, e.g.*, List v. Fashion Park, Inc., 340 F.2d 457, 462-63 (2d Cir.) (misrepresentation must be relied on), *cert. denied*, 382 U.S. 811 (1965). *But see* Affiliated Ute Citizens v. United States, 406 U.S. 128, 152-54 (1972) (positive proof of reliance not necessary if material to plaintiff's decision); Pappas v. Moss, 393 F.2d 865, 869 (3d Cir. 1968) (proof of actual reliance not necessary); Vine v. Beneficial Fin. Co., 374 F.2d 627, 635 (2d Cir.) (reliance not necessary where no volitional acts required), *cert. denied*, 289 U.S. 970 (1967).

[32] See note 6 *supra*.

[33] *Id.*

cific reference to fraud.[34] This view is further supported by the fact that although fraud is somewhat narrowly defined at common law,[35] equity courts have expanded the concept.[36] Despite this expansive equitable definition of fraud and statements by federal courts that rule 10b-5 is not limited to the elements of common law fraud,[37] early federal decisions applying 10b-5 to corporate mismanagement explicitly required a showing of deception.[38] Additionally, a conceptual difficulty in applying the deception standard to mismanagement cases arises in the explanation of how a corporation can be defrauded when its own directors supposedly perpetrated the fraud.[39] The Second Circuit, dealing with this problem in *Ruckle v. Roto American Corp.*,[40] suggested in dictum that a corporation could be defrauded even though the entire board was fully informed[41] if all directors had an interest adverse to the corporate entity.[42] Despite

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[34] This was the conclusion reached by the court of appeals in Green v. Santa Fe Indus., Inc., 533 F.2d 1283, 1286-87 (2d Cir. 1976), *rev'd*, 97 S. Ct. 1292 (1977). There is little evidence in the legislative history which would reveal Congress' intent as to the reach of § 10b of the Securities Exchange Act, under which rule 10b-5 was promulgated. However, a statement by one of the draftsmen of the section indicates that the provision was meant to be expansive: "Subsection (c) says, 'Though [*sic*] shalt not devise any other cunning devices.' . . . Of course subsection (c) is a catch-all clause to prevent manipulative devices." *Stock Exchange Regulation: Hearings on H.R. 7852 and H.R. 8720 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 115 (1934) (statement of Rep. Corcoran), *quoted in* A. BROMBERG, SECURITIES LAW: FRAUD § 2.2, at 332 (1973). Some support for a flexible reading of subsections (a) and (c) may also be found in the broad purposes of the Act as a whole. See note 12 and accompanying text *supra*.

[35] Common law fraud involves a failure to speak accurately, by affirmative act or nondisclosure, knowing that the representation is false, with intent to induce reliance, followed by reliance and damages. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 685-86 (4th Ed. 1971).

[36] Equity courts have frequently included unfairness and breaches of fiduciary duty in the concept of fraud. Sherrard, *Fiduciaries and Fairness Under Rule 10b-5*, 29 VAND. L. REV. 1385, 1391 (1976).

[37] The Fifth Circuit, in Hooper v. Mountain States Sec. Corp., 282 F.2d 195 (5th Cir. 1960), stated that rule 10b-5 "greatly expands the protection frequently so hemmed in by the traditional concepts of common law misrepresentation and deceit." *Id.* at 201; *see, e.g.*, SEC v. Texas Gulf Sulfur Co., 401 F.2d 833, 855 (2d Cir. 1968) ("the securities laws should be interpreted as an expansion of the common law"), *cert. denied*, 394 U.S. 976 (1969); Stevens v. Vowell, 343 F.2d 374, 379 (10th Cir. 1965) ("not necessary to allege or prove common law fraud to make out a case" under rule 10b-5). *But see, e.g.*, Ernst & Ernst v. Hochfelder, 96 S. Ct. 1375, 1381 (1976) (common law element of scienter necessary in 10b-5 action).

[38] *See, e.g.*, Hooper v. Mountain States Sec. Corp., 282 F.2d 195, 201 (5th Cir. 1960) (10b-5 is an expansion of the common law fraud requirements in securities transactions).

[39] A corporation is generally charged with constructive knowledge of all material facts known by its officers and agents. 3 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 790, at 12 (rev. perm. ed. 1975).

[40] 339 F.2d 24 (2d Cir. 1964).

[41] Since it found that information was withheld from one director, the court did not decide the question of 10b-5 liability in the face of full disclosure to all the directors. *Id.* at 29.

[42] *Id.*

this indication that the deception standard might be discarded,[43] within one month the same court held in *O'Neill v. Maytag*[44] that a 10b-5 cause of action could not exist absent an allegation of deception.[45] Admitting that the directors' conduct was a breach of fiduciary duty, the court nonetheless held that mismanagement alone was insufficient to state a cause of action.[46] Although *O'Neill*'s deception requirement was accepted by a number of courts,[47] continued conflict over the standard led to the creation of a new theory of liability in *Schoenbaum v. Firstbrook*.[48] Majority shareholders were charged with improperly using their control over the corporation to acquire stock at an inadequate price.[49] Despite the fact that full disclosure had been made to the corporation's directors, the Second Circuit found a 10b-5 violation because the majority shareholder had exercised a "controlling influence" over the directors for an improper purpose.[50] The controlling influence standard, which unquestionably constituted a rejection of the traditional deception standard,[51] was welcomed by some commentators as the "new fraud."[52] The Second Circuit, however, later changed its course

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[43] The court's suggestion that a corporation could be defrauded by its own directors has been viewed by writers as a movement away from the deception standard. *E.g.*, Comment, *supra* note 17, at 994. Indeed, as one commentator has pointed out:

> Implicit in this rationale is the argument that a conflict of interest on the part of those who owe fiduciary obligations to the entity could prevent them from acting in the best interest of the corporation. The corporation would suffer the same harm whether or not actual deception existed.

Sherrard, *supra* note 36, at 1392.

[44] 339 F.2d 764 (2d Cir. 1964).

[45] *Id.* at 767-68. The court distinguished *Ruckle,* stating that since one director was deceived, a clear allegation of deception had been involved in that case. *Id.* at 767-68.

[46] *Id.*

[47] *E.g.*, Vine v. Beneficial Fin. Co., 374 F.2d 627, 635 (2d Cir.) (deception caused plaintiff to become forced seller), *cert. denied*, 389 U.S. 970 (1967); Cohen v. Colvin, 266 F. Supp. 677, 684 (S.D.N.Y. 1967) (challenged statements must be shown to be deceptive); Carliner v. Fair Lanes, Inc., 244 F. Supp. 25, 28-29 (D. Md. 1965) (deception necessary in company's repurchase of its own stock).

[48] 405 F.2d 200, *rev'd on rehearing en banc*, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969).

[49] The price was allegedly unfair because the controlling shareholders possessed inside information that would have increased the value of the stock if the information had been made public. 405 F.2d at 218.

[50] *Id.* at 218-19. As an alternative holding, the court stated that the majority stockholders were guilty of deceiving the minority stockholders. *Id.* at 220.

[51] The "controlling influence" itself was held to constitute an "act or course of business to defraud" in viiolation of subsection (c) of rule 10b-5. *Id.* at 219-20. The controlling influence standard has also been applied in one Fifth Circuit case, Shell v. Hensley, 430 F.2d 819, 827 (5th Cir. 1970) (deception need not be shown when director exercised controlling influence to cause corporation to enter transaction in which he had an interest).

[52] *See generally* Bloomenthal, *From Birnbaum to Schoenbaum: The Exchange Act and Self-Aggrandizement*, 15 N.Y.L.F. 332 (1969); Jacobs, *The Role of Securities Exchange Act Rule 10b-5 in the Regulation of Corporation Management*, 59 CORNELL L. REV. 27 (1973); Note, *The Controlling Influence Standard in Rule 10b-5 Corporate Mismanagement Cases*, 86 HARV. L. REV. 1007 (1973); Note, Schoenbaum: *The "New Fraud" Expands Federal Corporation Law*, 55 VA. L. REV. 1103 (1969).

and returned to a deception standard in *Popkin v. Bishop*.[53] In *Popkin*, the court rejected an attack on the fairness of exchange ratios in a long-form merger where there was full disclosure and a justifiable business purpose, holding that some deception is required in a 10b-5 action.[54] Although *Popkin* has been followed in a number of cases,[55] some courts have continued to take a more expansive view of rule 10b-5.[56]

In contrast to intermittent attempts by appellate courts to extend 10b-5 beyond deception, recent Supreme Court decisions indicate an inclination to limit application of the rule.[57] In *Ernst & Ernst v. Hochfelder*,[58] the Court construed the 10b-5 prohibition of "acts or devices to defraud" as requiring some element of scienter.[59] In making this determination, the Court looked to the language of section 10(b) of the Securities Exchange Act to ascertain the conduct that Congress intended to prohibit. Finding that the words "manipulative" and "deceptive"[60] revealed an intent to prohibit intentional conduct alone,[61] the

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[53] 464 F.2d 714 (2d Cir. 1972).

[54] *Id.* at 718. The court stated that the *Schoenbaum* emphasis on improper self-dealing did not eliminate the deception requirement. In justifying this retreat from the far-reaching implications of *Schoenbaum*, the court relied on the alternate holding in that case that the minority shareholders were deceived through nondisclosure. *Id.* at 719. The restrictive aspects of the *Popkin* decision are obvious. The court did, however, suggest a more lenient approach to cases in which state law did not require prior shareholder approval, stating that in such cases it would be more reasonable to concentrate on "the impropriety of the conduct itself rather than on the 'failure to disclose' it." *Id.*

[55] *See, e.g.*, Kaufmann v. Lawrence, 386 F. Supp. 12, 17 (S.D.N.Y. 1974) (exchange offer valid where full disclosure made); Levine v. Biddle Sawyer Corp., 383 F. Supp. 618, 622 (S.D.N.Y. 1974) (deception necessary in short-form merger).

[56] In Bryan v. Brock & Blevins Co., 343 F. Supp. 1062 (N.D. Ga. 1972), *aff'd on other grounds*, 490 F.2d 563 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974), the district court found a merger for the sole purpose of eliminating the minority to be violative of rule 10b-5 despite full disclosure. In affirming the decision, however, the Fifth Circuit found a violation of state law and did not reach the question of 10b-5 liability. 490 F.2d at 571.

[57] *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 759-60 (1975) (refusing to extend a private cause of action to a plaintiff who rejected offer of stock).

[58] 425 U.S. 185 (1976).

[59] As used by the Court, the term "scienter" refers to an intent to deceive, manipulate, or defraud, reckless disregard for the truth, or knowing use of some practice to defraud. *Id.* at 192 n.12. Previous courts had differed in determining whether scienter was a necessary element of a 10b-5 cause of action and several had held that negligent conduct alone is sufficient for liability. *E.g.*, White v. Abrams, 495 F.2d 724, 730 (9th Cir. 1974) (interpreting the flexible duty standard as only requiring proof of negligence); Kohler v. Kohler Co., 319 F.2d 634, 637 (7th Cir. 1963) (holding corporate fiduciaries to a higher duty than mere abstention from fraudulent practices). Other courts have required some element of scienter. *E.g.*, Clegg v. Conk, 507 F.2d 1351, 1361-62 (10th Cir. 1974) (declining to extend the prohibition to cases of simple negligence), *cert. denied*, 422 U.S. 1007 (1975); Lanza v. Drexel & Co., 479 F.2d 1277, 1306 (2d Cir. 1973) (reasoning that proof of reckless disregard for truth was necessary to establish liability under 10b-5).

[60] See note 13 *supra*.

[61] The court noted that "manipulation" is a term of art when used in connection with a securities transaction, connoting intentional or willful conduct intended to deceive by controlling or artificially affecting the price of securities. 425 U.S. at 199. Likewise, there

Court refused to extend the scope of rule 10b-5 to include negligent conduct.[62]

In addition to the problem of defining fraud, a second, more subtle difficulty pervades 10b-5 mismanagement cases concerning the extent to which federal courts should, in the absence of explicit congressional guidance, apply rule 10b-5 to an area traditionally regulated by state law.[63] Since section 10(b) expressly declares deceptive acts to be unlawful, rule 10b-5 must be applied in deception cases notwithstanding any existing state remedies.[64] Section 10(b) does not, however, expressly regulate fiduciary duties, nor does the legislative history clearly reveal such an intent.[65] Extension of the rule into this area has been criticized where it would derogate state laws,[66] and recent Supreme Court decisions reflect the importance of federal-state relationships in decisions expanding federal law into state-regulated areas. In *Cort v. Ash*,[67] for example, the Court refused to grant a private right of action under a federal statute prohibiting corporate contributions in federal elections.[68] Specifically, a shareholder alleged that the corporation directors' violation of the election statute was a breach of fiduciary duty.[69] Finding no express cause of action under the statute, the Court refused to imply a federal right since such action would be an unnecessary intrusion into a state-regulated area[70] without furthering the purpose

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was no indication from the legislative history that Congress intended to prohibit a broader range of conduct. *Id.* at 202.

[62] The Court reasoned that the power of an administrative agency is the power to make rules to effectuate congressional intent as expressed by the statute. Consequently, the scope of rule 10b-5 cannot exceed the power granted under § 10(b). "When a statute speaks so specifically in terms of manipulation and deception, . . . and when its history reflects no more expansive intent, we are quite unwilling to extend the scope of the statute . . . ." *Id.* at 214.

[63] 64 GEO. L.J. 1381, 1396 (1976).

[64] Courts have repeatedly stated that when a 10b-5 cause of action does exist, rule 10b-5 will be applied regardless of the existing state remedies. *E.g.*, Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 380 (2d Cir. 1974), *cert. denied*, 421 U.S. 476 (1975); Popkin v. Bishop, 464 F.2d 714, 718 (2d Cir. 1972); *cf.* J.I. Case Co. v. Borak, 377 U.S. 426, 434 (1964) (§ 14(a) of Securities Exchange Act applicable despite provisions of state corporate law).

[65] See note 34 *supra*.

[66] *See, e.g.*, Green v. Santa Fe Indus., Inc., 533 F.2d 1283, 1307-08 (2d Cir. 1976) (Moore, J., dissenting) (federal courts are bound to follow state law under Erie R.R. v. Tompkins, 304 U.S. 64 (1938)), rev'd; 97 S. Ct. 1292 (1977); Voege v. Smith, 329 F. Supp. 180 (S.D.N.Y. 1971) (refusing federal injunctive relief and holding that state law controls); Kaminsky v. Abrams, 281 F. Supp. 501 (S.D.N.Y. 1968) (application of fiduciary duties as defined by state law absent direct conflict with federal securities legislation or express congressional intent for federal preemption). Since some state laws provide that appraisal is the sole remedy of a minority shareholder, this concern is particularly pertinent to the corporate mismanagement cases arising from going-private transactions. See note 23 *supra*.

[67] 422 U.S. 66 (1975).

[68] *Id.* at 85.

[69] *Id.* at 71.

[70] In a significant statement on the importance of federalism, the Court concluded:

> Corporations are creatures of state law, and . . . except where federal law expressly requires certain responsibilities of directors with respect to stockholders,

of federal law.[71] In short, the Court deemed it appropriate to relegate the shareholder to whatever remedy is provided by state law.[72]

In the instant case, the Court reasoned that since section 10(b)[73] specifically prohibits "manipulation" and "deception,"[74] and since the legislative history reveals no intent to prohibit other conduct,[75] Congress only intended to proscribe conduct involving these elements.[76] Furthermore, since the rulemaking power of an administrative agency is the power to effectuate the will of Congress,[77] a rule 10b-5 cause of action exists only when conduct can be viewed as manipulative or deceptive.[78] The Court concluded that since full disclosure was made,[79] no deception existed under the statute.[80] As to the second element, the Court reasoned that since "manipulation" is a term of art referring to practices which artificially affect market activity,[81] the term does not include mere breach of fiduciary duty.[82] Thus, since some element of manipulation or deception is required,[83] and since defendant's conduct involved neither, the alleged breach of

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> state law will govern the internal affairs of the corporation . . . . We are necessarily reluctant to imply a federal right . . . where the laws governing the corporation may put a shareholder on notice that there may be no such recovery.

Id. at 84-85.

[71] *Id.* This narrow reading of the purposes of the statute was also utilized in another recent Supreme Court decision, Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926, 949 (1977) (private right of action for tender offeror under rule 10b-5 unnecessary to fulfill purposes of § 10(b)). *But cf.* J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (implied right of action under § 14(a) of Securities Exchange Act found necessary to further its purposes).

[72] 422 U.S. at 84.

[73] The Court reiterated the principle set out in *Hochfelder* that the starting point of statutory construction is the language itself. Santa Fe Indus., Inc., v. Green, 97 S. Ct. 1292, 1300 (1977).

[74] Under this view, a construction of "fraud" under rule 10b-5 to include all fiduciary misconduct would extend the scope of the rule beyond the commonly accepted meaning of the terms manipulative and deceptive. *Id.*

[75] The Court noted that the only reference to § 10(b) in the legislative history was in S. REP. No. 792, 73d Cong., 2d Sess. 6 (1934), which merely stated that the section was directed at manipulative and deceptive practices which serve no useful function. 97 S. Ct. at 1300 n.13.

[76] 97 S. Ct. at 1300.

[77] *Id.*, *citing* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976).

[78] 97 S. Ct. at 1301.

[79] *Id.* See note 7 *supra*.

[80] Although the opinion does not specifically define the term deception, the Court apparently viewed it as synonymous with misrepresentation or nondisclosure. *Id.* at 1301-02.

[81] The Court listed several practices as examples of conduct covered by the term: wash sales, matched orders and rigged prices. *Id.* at 1302.

[82] The Court reasoned that Congress would not have resorted to a term of art if it had intended to include all instances of fiduciary unfairness. *Id.*

[83] Recognizing the principle that § 10(b) should be read flexibly, Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 12-13 (1971), the Court nevertheless held that the statute and rule need not be extended beyond deception and noted that the cases relied on by the respondent, although reflecting this principle, all contained some element of deception. 97 S. Ct. at 1301-02.

fiduciary duty alone did not constitute a violation of rule 10b-5.[84]

The instant case will have the immediate effect of ending the confusion over whether deception is a necessary element in cases involving a breach of fiduciary duty and will provide a clearer guide for potential defendants who rely on compliance with state law. Furthermore, relegation of "fully-disclosed" plaintiffs to state remedies will prevent erosion of state laws and remove the possibility of excessive litigation under rule 10b-5. The decision fails, however, to recognize the insufficiency of state protection in many instances. There has been an increasing tendency by states to liberalize state corporations codes to favor management at the expense of investors. The ultimate state concern appears to be protection of the corporate entity, with emphasis placed on the financial fairness of the transaction to the corporation.[85] Consistent with this trend, protection of minority shareholders is often inadequate. In a short-form merger requiring no prior notice, for example, minority shareholders may not enjoin the merger and are therefore limited to the often cumbersome and ineffective state appraisal remedy.[86] With the increasing state protection of management, limiting rule 10b-5 to enforcement of full disclosure will result in the exclusion of a significant group of plaintiffs who find little protection at the state level. Although Congress did not expressly show an intent to regulate fiduciary conduct under section 10(b), neither does the Act reveal an intent to exclude such conduct.[87] Accordingly, in the absence of explicit congressional guidance, interpretation rests upon statutory construction and policy considerations. In the instant case, how-

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[84] 97 S. Ct. at 1302. Although indicating that the foregoing considerations were dispositive of the case, see notes 73 through 83 and accompanying text *supra*, the Court also discussed principles of federalism which supported the ruling. First, since the purpose of the statute was promotion of full disclosure, a cause of action for misconduct beyond nondisclosure or deception was unnecessary. *Id.* at 1303. See note 71 *supra*. Furthermore, the Court stated that since extension of rule 10b-5 to all fiduciary misconduct would derogate traditional state regulation there should be no extension absent congressional guidance. *Id.* at 1303-04. See notes 23 through 24 and accompanying text *supra*. Justice Brennan adopted the court of appeals' broad interpretation of "fraud" in subsection (a) and (c) of rule 10b-5 to include a breach of fiduciary duty of the nature alleged by the plaintiffs. *Id.* at 1304 (Brennan, J., dissenting); *see* Green v. Santa Fe Indus., Inc., 533 F.2d 1283, 1286-87 (2d Cir. 1976), *rev'd*, 97 S. Ct. 1292 (1977). Justices Blackmun and Stevens expressed concern that this narrow construction of rule 10b-5 might result in a denial of relief to subsequent plaintiffs deserving of protection. 97 S. Ct. at 1304 (concurring opinions). *See also* Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926, 955 (1977)(Stevens, J., dissenting); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 215 (1976) (Blackmun, J., dissenting).

[85] DeBono, *supra* note 23, at 1197-98.

[86] Commentators have repeatedly emphasized the inadequacy of state appraisal remedies. Specifically, determining equivalence is difficult and appraisal does not compensate for intangible interests such as participation in the corporation. These problems are particularly noticeable in the fiduciary setting where, since the appraisal does not include increases in profits resulting from the merger, appraisal may result in the shareholder receiving less than his stock is worth. 64 GEO. L.J. 1381, 1396-99 (1976). *See generally* Brudney, *supra* note 18; notes 21 through 24 *supra*.

[87] See notes 34 & 75 *supra*.

ever, the Court resorted to a highly technical statutory construction and relied on a sparse legislative history to limit the application of the rule.[88] By focusing on the broad, stated purposes of the Securities Exchange Act,[89] the Court could have provided appropriate relief through a more flexible definition of "fraud" in subsections (a) and (c) of 10b-5.

Several policy considerations do, however, support the Court's holding in the instant case. Principles of federalism are of primary importance in any decision involving an area traditionally regulated by the states. Extension of rule 10b-5 to fiduciary misconduct would undoubtedly have had a debilitating effect on state corporate law where defendants have fully complied with state requirements in a given transaction.[90] Furthermore, the authority of state decisions could become subject to uncertainty, and inconsistencies between federal and state law might have resulted. Where Congress has not provided explicit guidance for such an encroachment on state law, the Court's reluctance to authorize an extension is understandable. But despite the importance of these considerations, other federal interests arguably justify such an extension. For example, the federal interest in regulation of the securities market is easily justified in light of the expansion of these markets to all parts of the country. Federal control would promote a uniform standard of conduct and assure continuity in the protection of investors. Similarly, it has been suggested that a federal interest exists in regulating all intentional misconduct connected with the sale of securities since the stated purpose of securities laws is to protect investors.[91] Despite the need for relief from corporate mismanagement and the federal interest in providing this remedy, the Court's decision in the instant case effectively removes the probability that such relief will be afforded by the judiciary. The most effective, and possibly the only solution appears to be the creation of fiduciary standards by federal statute. Such an approach, suggested by several writers,[92] would resolve the conflicts in the corporate mismanagement area and would avoid the confusion inherent in judicial attempts to apply rule 10b-5 to an area which it does not expressly govern.[93]

Deborah Hodges Bell

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[88] See notes 73 through 82 and accompanying text *supra*.

[89] See note 12 and accompanying text *supra*.

[90] See note 23 *supra*.

[91] Sherrard, *supra* note 36, at 1416-17.

[92] *See generally* Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974).

[93] The Securities and Exchange Commission has proposed rules 13e-3A and 13e-3B in response to claims of corporate mismanagement arising out of merger transactions. The rules would place disclosure requirements and other limitations, including a requirement of "fair value," on going-private transactions. Proposed Rules 13e-3A and 13e-3B, SEC Securities Act Release No. 5507 (Feb. 6, 1975), *noted in* 45 U.M.K.C.L. REV. 297, 308 (1976).

CONTRACTS—PROMISSORY ESTOPPEL AND THE U.C.C. STATUTE OF FRAUDS—SUBCONTRACTOR IS NOT ESTOPPED TO ASSERT THE STATUTE OF FRAUDS DESPITE GENERAL CONTRACTOR'S RELIANCE ON ORAL SUB-BID IN CALCULATING THE PRIME BID

Plaintiff, C.R. Fedrick, brought a civil action[1] against defendant Borg-Warner Corporation to recover monetary damages for breach of an alleged oral contract to supply certain pumps.[2] Borg-Warner, as a subcontractor, had submitted to Fedrick, the prime contractor, an oral sub-bid[3] for use in computing Fedrick's successful general bid on a construction project.[4] After Fedrick was awarded the general contract, Borg-Warner revoked its sub-bid and refused to sell the pumps at the original price.[5] Fedrick asserted that its reliance on Borg-Warner's oral sub-bid in calculating its prime bid made the sub-bid irrevocable notwithstanding the Statute of Frauds.[6] The United States District Court for the Northern District of California rendered summary judgment in favor of Borg-Warner, holding that the applicable Statute of Frauds[7] barred the plain-

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[1] Suit was originally instituted in the Superior Court of California for the County of Marin, but the action was removed to the United States District Court for the Northern District of California pursuant to 28 U.S.C. § 1446 (1970). Because jurisdiction was predicated on diversity, the federal court was required to apply the substantive law of California, where the contract was alleged to have been made. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

[2] Fedrick subsequently purchased the pumps from another supplier, incurring alleged damages of $95,903. C.R. Fedrick, Inc. v. Borg-Warner Corp., 552 F.2d 852, 855 (9th Cir. 1977).

[3] A dispute over the actual terms of the sub-bid arose after submission of the prime bid but before the prime contract was awarded. Fedrick contended that Borg-Warner's bid was based on the pumps as required by the specifications of the prime contract, while Borg-Warner argued that its bid was subject to certain exceptions. Borg-Warner suggested certain modifications to bring the pumps into accordance with the contract specifications with an accompanying upward price revision. *Id.* at 854-55.

[4] *Id.* at 854.

[5] *Id.* at 854-55.

[6] *Id.* at 856.

[7] The district court applied CAL. COM. CODE § 2201 (West 1964), which provides:

> (1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
>
> (2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subdivision (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.
>
> (3) A contract which does not satisfy the requirements of subdivision (1) but which is valid in other respects is enforceable

tiff's action and that relief could not be granted under the theory of promissory estoppel.[8] On appeal to the United States Court of Appeals for the Ninth Circuit, *held*, affirmed. Where a prime contractor, in computing its successful general bid, relies upon a supplier's oral sub-bid which the supplier subsequently revokes, the doctrine of promissory estoppel does not bar the supplier from asserting the Statute of Frauds as a defense.[9] *C.R. Fedrick, Inc. v. Borg-Warner Corp.*, 552 F.2d 852 (9th Cir. 1977).

The underlying purpose of contract law has been characterized as "the realization of reasonable expectations that have been induced by the making of a promise."[10] This concept of expectation, however, appears to have been antedated by the concept of reliance.[11] Judicial history and legal scholars have long endorsed enforcement of a promise which has induced detrimental reliance on the part of the promisee.[12] Despite its age and strength as a method of escaping the traditional bonds of consideration,[13] the doctrine of promissory estoppel[14]

(a) If the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

. . . .

(c) With respect to goods for which payment has been made and accepted or which have been received and accepted . . . .

[8] 552 F.2d at 856-57. The doctrine of promissory estoppel is embodied in RESTATEMENT OF CONTRACTS § 90 (1932):

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

[9] Although not within the scope of this Note, the court also based its decision on two alternative holdings. First, the court found that the parties were "merchants" within the meaning of CAL. COM. CODE § 2104 (West 1964) and concluded that the dispute over the actual terms of the sub-bid constituted a permissible revocation of the oral bid prior to receipt of any confirmatory "writing" from Fedrick under CAL. COM. CODE § 2201(2) (West 1964). See note 7 *supra*. Furthermore, none of Fedrick's subsequent writings to Borg-Warner were sufficient to confirm the contract. 552 F.2d at 855. The court also concluded that the Statute of Frauds defense was not precluded by the doctrine of equitable estoppel. *Id.* at 857-58. See note 13 *infra*.

[10] 1 A. CORBIN, CONTRACTS § 1, at 2 (1963).

[11] Evidence exists to support the contention "that the original enforcement of informal contracts in the assumpsit action was based on the reasonable reliance of the promisee." J. MURRAY, CONTRACTS § 91, at 196 (2d rev. ed. 1974). Three cases reported before 1500 held that a plaintiff who had incurred detriment on the faith of the defendant's promise was entitled to equitable relief. J. AMES, LECTURES ON LEGAL HISTORY 143 (1913).

[12] J. MURRAY, *supra* note 11, § 91, at 195-96. *See* A. CORBIN, *supra* note 10, § 195, at 197-99 (explaining the consistency of the doctrine of detrimental reliance through historical development and current definitions); Fuller & Perdue, *The Reliance Interest in Contract Damages* (pt. 1), 46 YALE L.J. 52, 66-69 (1936) (detrimental reliance as a motive for judicial intervention).

[13] The generally accepted rule is that a representation must involve a past or present fact or state of facts, as distinguished from a promise concerning the future, in order to provide the foundation for an estoppel. The doctrine of promissory estoppel, however,

was not expressly formulated until the twentieth century.[15] The doctrine may be found in its current form in section 90 of both the original[16] and the second[17]

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represents an exception to this rule. Annot., 48 A.L.R.2d 1069, 1071 (1956). Equitable estoppel, or estoppel in pais, is concerned with a misrepresentation of a present fact or state of facts coupled with resulting detrimental reliance on the misrepresentation. 1 S. WILLISTON, CONTRACTS § 139 (3d ed. 1957). Promissory estoppel does not deal with a misrepresentation of a past or present fact but arises rather where one party promises that a situation will be true in the future. *Id.* § 140. *See generally* J. CALAMARI & J. PERILLO, CONTRACTS § 100, at 173 & n.9, § 166, at 268 (1970). The other important distinction between equitable and promissory estoppel is that equitable estoppel can be used only as a defense, while promissory estoppel is also available as a cause of action for damages. *See* Note, *Estoppel: Status of Promissory Estoppel in Oklahoma,* 22 OKLA. L. REV. 89, 89-90 (1969) (equitable estoppel available only as a defense to a claim by a misrepresenting party against the party relying on the misrepresentation).

[14] Under this doctrine, the promisee's detrimental reliance or his forbearance in reliance on a promise "constitutes [either] a substitute for consideration, or a sufficient reason for enforcement of the promise without consideration." The promisor is thus estopped to deny the enforceability of his promise for lack of consideration. L. SIMPSON, CONTRACTS § 61, at 112 (2d ed. 1965). Unlike a promise supported by consideration where detriment is bargained for in exchange for the promise, a promise supported by promissory estoppel does not involve a bargain. This unbargained-for detriment is a consequence of the promise but does not induce the making of the promise. J. CALAMARI & J. PERILLO, *supra* note 13, § 99, at 172. *See* Annot., 48 A.L.R.2d 1069, 1073 (1956) (there should be no requirement that the promisor receive any benefit in applying the doctrine of promissory estoppel as a substitute for consideration).

[15] Promissory estoppel as a contract doctrine was first formulated by Williston in 1920, and the term was evidently first used in his treatise on contracts in the same year. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine,* 98 U. PA. L. REV. 459, 459 & n.1 (1950). Corbin, however, found the term objectionable. *See* A. CORBIN, *supra* note 10, at § 204 (the word "estoppel" has been applied to cases of misrepresentation of facts and not to promises). Typical factual situations from which the doctrine was formed include intra-family promises, oral gifts of land, gratuitous agencies and bailments, and charitable subscriptions. *See generally* J. CALAMARI & J. PERILLO, *supra* note 13, at §§ 100-04; Henderson, *Promissory Estoppel and Traditional Contract Doctrine,* 78 YALE L.J. 343, 350-52 (1969).

[16] See note 8 *supra.*

[17] RESTATEMENT (SECOND) OF CONTRACTS § 90, at 215 (Tent. Drafts Nos. 1-7, 1973) provides in pertinent part:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

There are some noticeable differences between the first and second *Restatements.* The second *Restatement* draft, unlike the original, does not contain language requiring reliance "of a definite and substantial character." The second *Restatement* also protects third-party reliance interest and provides a flexible remedy for breach of a promise causing justifiable detrimental reliance. It can be anticipated that the second *Restatement,* due to its liberalization of the doctrine of promissory estoppel, will provide an additional stimulus for the utilization of the doctrine, just as the original *Restatement* gave it its initial impetus. J. CALAMARI & J. PERILLO, *supra* note 13, § 111, at 186 (1970).

Restatement of Contracts. Since its formulation,[18] the principle has been applied to varying fact situations in which a promisee's reliance on a promise led ultimately to his detriment.[19] Substantial controversy has arisen, however, over its application to certain situations,[20] especially to commercial transactions,[21]

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[18] For an exposition of the overall history and evolution of the doctrine of promissory estoppel and the precedent for RESTATEMENT OF CONTRACTS § 90 (1932), *see generally* Boyer, *Promissory Estoppel: Principle From Precedents* (pts. 1 & 2), 50 MICH. L. REV. 639, 873 (1952); Fridman, *Promissory Estoppel*, 35 CAN. B. REV. 279 (1957) (the doctrine in the United States and England); 22 MINN. L. REV. 843 (1938).

[19] The doctrine has been utilized in cases where there were, for example, promises of franchises to dealers, gratuitous promises concerning the extension, renewal, or modification of leases, promises that the statute of limitation will not be pleaded, promises of charitable contributions, promises of gifts in exchange for personal services, and promises of employee pensions. Annot., 48 A.L.R.2d 1069, 1079-89 (1956).

[20] Three situations in particular have been the subject of much debate: (1) promises of dealer franchises, *see* Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267, 275 (1965) (promissory estoppel may support a cause of action despite the absence of the elements necessary for formation of a contract—it is not merely a substitute for or the equivalent of consideration); (2) promises of employee pension, *see* Feinberg v. Pfeiffer, 322 S.W.2d 163, 167-69 (Mo. Ct. App. 1959) (promise of pension in contemplation of prospective retirement). *But cf.* Spooner v. Reserve Life Ins. Co., 47 Wash. 2d 454, 287 P.2d 735, 737-39 (1955) (no liability for promise of benefits while retaining the power to modify or withdraw the offer at will—an illusory promise); (3) bids by subcontractors, see notes 24 through 43 and accompanying text *infra*.

[21] The natural reluctance of many courts to utilize the doctrine of promissory estoppel in commercial situations is due to the gratuitous promise attribute of the doctrine, *i.e.* the fact that the standard application of the doctrine of promissory estoppel involves a gratuitous promise inducing justifiable detrimental reliance. Therefore, the question inevitably arose as to whether the doctrine was to apply only to the gratuitous promise situation or whether it could be applied in transactions contemplating a bargain. *See generally* J. MURRAY, *supra* note 11, § 93, at 203; 7 NAT. RESOURCES J. 407, 407-10, 411 n.28 (1967). *Compare* James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344, 346 (2d Cir. 1933) ("[A]n offer for an exchange is not meant to become a promise until a consideration has been received . . . . There is no room in such a [bargaining] situation for the doctrine of 'promissory estoppel.'") *and* Tatsch v. Hamilton-Erickson Mfg. Co., 76 N.M. 729, 418 P.2d 187, 189 (1966) (implies that promissory estoppel is not applicable in commercial cases) *with* N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736, 739 (D.C. Cir. 1963) (promissory estoppel applies to commercial transactions) *and* Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654, 661 (7th Cir. 1941) ("The mere fact that the transaction is commercial in nature should not preclude the use of the promissory estoppel."). *See generally* Henderson, *supra* note 15, at 343-44. Since such commercial situations involve bargained for reliance, and RESTATEMENT OF CONTRACTS § 90 (1932) was meant to apply to unbargained for reliance, see note 14 *supra*, in order to prevent distortion of § 90 through its expansion into commercial situations, RESTATEMENT (SECOND) OF CONTRACTS § 89B(2) (Tent. Draft Nos. 1-7, 1973) provides that:

> An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

See id. Comment e, at 204 & Reporter's Note e, at 206.

and particularly to the construction bidding process.[22]

An offer is typically revocable in the absence of consideration. Thus, since there is generally no justification for an offeree's reliance on such an offer, the offer cannot be made irrevocable under the doctrine of promissory estoppel.[23] The construction bidding process, however, involves different considerations since, due to customary business practices in the construction industry,[24] the general contractor's reliance on the lowest sub-bid received in the calculation of its prime bid is foreseeable.[25] The courts which have considered promissory estoppel in the context of the construction bidding process have created two differing lines of precedent.

The original view had its genesis in *James Baird Co. v. Gimbel Brothers, Inc.*,[26] where the general contractor relied on an unsolicited bid from the subcontractor in preparing its successful prime bid. When the subcontractor discovered that it had made a mistake in calculating its sub-bid, it revoked the offer before the prime contract was awarded.[27] Judge Learned Hand held that the subcontractor had effectively withdrawn its offer before acceptance[28] and that the doctrine of promissory estoppel had no place in a bargaining situation.[29] Thus, *Gimbel* and its progeny[30] apply the traditional principles of offer and acceptance to the construction bidding process, with the effect that a general contractor who does not accept the sub-bid before relying on it to compute its general bid cannot invoke the doctrine of promissory estoppel to make the sub-bid irrevocable.[31] Severe criticism directed toward the *Gimble* decision[32] culminated with the California Supreme Court's decision in *Drennan v. Star Paving Co.*,[33] which originated the modern line of authority.[34] The prime contractor in *Drennan* relied upon the bid of a paving subcontractor when calculating its successful general bid.[35] After the general contract was awarded, the subcontractor

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[22] 7 NAT. RESOURCES J. 407, 407 (1967).

[23] J. CALAMARI & J. PERRILLO, *supra* note 13, § 107, at 180.

[24] For a general discussion of the bidding process in the construction industry and its related problems, see Comment, *Construction Bidding Problem: Is There a Solution Fair to Both the General Contractor and Subcontractor*, 19 ST. LOUIS U.L.J. 552, 553-54 (1975); Note, *The "Firm Offer" Problem in Construction Bids and the Need for Promissory Estoppel*, 10 WM. & MARY L. REV. 212, 212-17 (1968).

[25] J. CALAMARI & J. PERILLO, *supra* note 13, § 107, at 181.

[26] 64 F.2d 344 (2d Cir. 1933).

[27] *Id.* at 345.

[28] *Id.*

[29] *Id.* at 346.

[30] *E.g.*, Southeastern Sales & Serv. Co. v. T.T. Watson, Inc., 172 So. 2d 239, 241 (Fla. Dist. Ct. App. 1965) (general contractor not bound, could have insisted on a contract, and could have sought relief from his own bid); Tatsch v. Hamilton-Erickson Mfg. Co., 76 N.M. 729, 418 P.2d 187, 189 (1966) (reliance is insufficient without acceptance of the bid).

[31] 64 F.2d at 346.

[32] *See, e.g.*, L. SIMPSON, *supra* note 14, § 61, at 118 n.79; 1 S. WILLISTON, CONTRACTS § 139, at 502 & n.25 (rev. ed. 1936); 28 ILL. L. REV. 419, 421-22 (1933); 20 VA. L. REV. 214 (1933).

[33] 51 Cal. 2d 409, 333 P.2d 757 (1958).

[34] Note, *supra* note 24, at 217.

[35] 333 P.2d at 758-59.

discovered an error in its bid and refused to perform the work at the price stated in the original bid.[36] The court neither found that a contract had been created nor enforced the bid itself. Rather, it found an implied subsidiary promise within the bid not to revoke the bid for a reasonable time.[37] The court, realizing the precarious position in which the general contractor would be placed by permitting the subcontractor to refuse to perform according to its bid, found that the equitable solution is to hold the subcontractor liable under the terms of its sub-bid.[38] The majority of courts which have dealt with this situation since *Drennan* have followed its teachings[39] in holding that under the doctrine of promissory estoppel, the sub-bid becomes irrevocable if justifiably[40] relied upon by the general contractor to its detriment.[41] Unlike *Gimbel*,[42] *Drennan* has generally been praised as providing a flexible and just solution to the construction bidding problem.[43]

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[36] *Id.* at 759-60.

[37] *Id.* at 760. For a discussion of the court's unique analysis and its related conceptual difficulties, see Henderson, *supra* note 15, at 355-56.

[38] 333 P.2d at 760-61. The court referred to injustice, fairness, and the loss falling on the party who made the mistake. *Id. See generally* Crane, *Promissory Estoppel May Make an Offer Irrevocable*, 1 B.C. INDUS. & COM. L. REV. 87 (1959); 47 CAL. L. REV. 405 (1959); 59 COLUM. L. REV. 355 (1959); 10 HASTINGS L.J. 435 (1959); 26 MO. L. REV. 356 (1961); 32 S. CAL. L. REV. 413 (1959).

[39] J. CALAMARI & J. PERILLO, *supra* note 13, § 107, at 181.

[40] *See* Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654, 660 (7th Cir. 1941) (reliance on a bid which is so low as to indicate mistake is unjustified); Leo F. Piazza Paving Co. v. Bebek & Brkich, 141 Cal. App. 2d 226, 296 P.2d 368, 371 (Dist. Ct. App. 1956) (reliance on an estimate is not justified).

[41] *See* N. Litterio & Co., Inc. v. Glassman Constr. Co., 319 F.2d 736, 739-40 (D.C. Cir. 1963) (promissory estoppel applicable; reversed and remanded for factual determination of justification for reliance); Air Conditioning Co. v. Richards Constr. Co., 200 F. Supp. 167, 171-73 (D. Hawaii 1961) (enforceable contract for sheet metal work); Reynolds v. Texarkana Constr. Co., 237 Ark. 583, 374 S.W. 2d 818, 819-20 (1964) (electrical subcontractor); Saliba-Kringlen Corp. v. Allen Eng'r Co., 15 Cal. App. 3d 95, 92 Cal. Rptr. 799, 808 (Ct. App. 1971) (same); H.W. Stanfield Constr. Corp. v. Robert McMullan & Son, Inc., 14 Cal. App. 3d 848, 92 Cal. Rptr. 669, 671 (Ct. App. 1971) (painting subcontractor); Norcross v. Winters, 209 Cal. App. 2d 207, 25 Cal. Rptr. 821, 828 (Dist. Ct. App. 1962) (school construction sub-bid); Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc., 291 Minn. 113, 190 N.W.2d 71, 75-76 (1971) (ventilation subcontractor); E.A. Coronis Assocs. v. M. Gordon Constr. Co., 90 N.J. Super. 69, 216 A.2d 246, 252 (1966) (structural steel subcontractor). Two post-*Gimbel* but pre-*Drennan* cases, Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654, 660-61 (7th Cir. 1941) and Northwestern Eng'r Co. v. Ellerman, 69 S.D. 397, 10 N.W.2d 879, 883-84 (1943), generally cited as belonging to this line of cases, contain dicta to the effect that promissory estoppel applies to the construction bidding process. 28 Mo. L. REV. 143, 144 (1963). In the *Robert Gordon* case, the court considered the doctrine of promissory estoppel but found insufficient detriment to support it. *See also* 47 CAL. L. REV. 405, 406 n.4 (1959) (promissory estoppel in *Northwestern Engineering* characterized as an alternative holding at best).

[42] For discussions distinguishing *Gimbel* rather than criticizing it, see A. CORBIN, *supra* note 10, at § 51 (distinguishing the case on the basis of foreseeability since the bid at issue was unsolicited); Note, *supra* note 24, at 217-20.

[43] Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc., 291 Minn. 113, 190

The *Gimbel-Drennan* split of authority as to the application of promissory estoppel in construction bidding cases widens even more drastically on the question of whether promissory estoppel will preclude a subcontractor who has submitted an oral bid from raising the Statute of Frauds[44] as a defense.[45] The courts seem to have taken three different positions. First, some courts have absolutely forbidden the use of the promissory estoppel doctrine as a means of avoiding the statute.[46] According to these courts, to hold otherwise would render the Statute of Frauds a virtual nullity. Second, it has been held that the doctrine may preclude the assertion of the statute where there is either a misrepresentation of compliance with the statute's requirements or detrimental reliance by a promisee upon an ancillary promise to reduce a parol agreement to a writing.[47] While recognizing that section 90 of the Restatement does not mention the Statute of Frauds,[48] this line of cases has interpreted section 178, comment f of the *Restatement*[49] as permitting limited use of section 90 to prevent the

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N.W.2d 71, 74 (1971); Note, *supra* note 24, at 225; 7 NAT. RESOURCES J. 407, 412 (1967).

[44] The original Statute of Frauds, 29 Car. 2, c.3 (1677), was enacted in an effort to prevent fraud through perjury. With the evolution of the laws of evidence and contracts came a continuing and growing controversy over the justification for its continued existence. Although the courts have formulated various ingenious exceptions to escape the harsh results caused by the statute, practically all of the state legislatures have retained statutes similar to the English original. Note, *Promissory Estoppel as a Means of Defeating the Statute of Frauds,* 44 FORDHAM L. REV. 114, 115 (1975).

[45] *See generally* 3 S. WILLISTON, CONTRACTS § 533A (3d ed. 1960); Annot., 56 A.L.R.3d 1037 (1974); Henderson, *supra* note 15, at 380-83 (discussing the collision of promissory estoppel with legislative policies); Note, *supra* note 44.

[46] *E.g.,* Tanenbaum v. Biscayne Osteopathic Hosp. Inc., 173 So.2d 492, 494-95 (Fla. Dist. Ct. App. 1965) (oral employment contract); Sinclair v. Sullivan Chevrolet Co., 45 Ill. App. 2d 10, 195 N.E.2d 250, 253 (App. Ct.) (oral employment contract; "[w]here . . . a case is clearly within the Statute of Frauds, promissory estoppel is inapplicable, for the net effect would be to repeal the Statute completely"), *aff'd,* 202 N.E.2d 516 (1964).

[47] Turtle Creek Square, Ltd. v. New York State Teachers' Retirement Sys., 432 F.2d 64, 65 (5th Cir. 1970) (Statute of Frauds defense not precluded since neither misrepresentation nor promise to make a memorandum found by the court); Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295, 298 (9th Cir. 1954) (oral promise of a written contract upon obtaining a franchise); Tiffany Inc. v. W.M.K. Transit Mix, Inc., 16 Ariz. App. 415, 493 P.2d 1220, 1225-26 (Ct. App. 1972) (oral bid by subcontractor unenforceable under the Statute of Frauds).

[48] The existence of this fact alone raises a serious question as to whether the drafters of the RESTATEMENT OF CONTRACTS § 90 (1932) intended it to bar application of the statute. Section 90 is contained in a part of the *Restatement* which pertains to the formation rather than the enforceability of contracts. This fact, combined with the history of promissory estoppel as a substitute for consideration, would offer support to those who disapprove of permitting estoppel to assert the Statute of Frauds. Annot., 56 A.L.R.3d 1037, 1049 (1974); Note, *supra* note 44, at 116-17.

[49] RESTATEMENT OF CONTRACTS § 178, Comment f (1932) provides:

> Though there has been no satisfaction of the Statute, . . . [a] misrepresentation that there has been such satisfaction if substantial action is taken in reliance on the representation, precludes proof by the party who made the representation that it was false; and a promise to make a memorandum, if

operation of the statute.[50] Under this approach, the reliance which gives rise to an estoppel is not reliance on the primary promise, but rather on a subsidiary promise either that the requirements of the statute have been met or that the parol agreement will be reduced to writing.[51] Exemplary of this theory is *Tiffany Inc. v. W.M.K. Transit Mix, Inc.*,[52] where the Arizona Supreme Court applied such a rationale, found no subsidiary promise, and thus held that a subcontractor's oral bid to supply highway construction goods was unenforceable under the Statute of Frauds.[53] Finally, a few courts have recognized that the principles of fraud and equitable estoppel form the basis of the promissory estoppel doctrine[54] and have held that promissory estoppel may bar the operation of the Statute of Frauds even in the absence of an ancillary promise to execute a writing.[55] These cases simply permit application of the doctrine, unhampered by section 178, comment f, to prevent the injustice which would result if the statute should be recognized as a good defense.[56] The California Supreme Court adopted this liberalized approach in *Monarco v. Lo Greco*[57] by specifically rejecting the argument that estoppel to plead the Statute of Frauds can arise only when there have been representations that a writing will be executed.[58] Similarly, in a case based in part upon the *Monarco* rationale,[59] the Hawaii Supreme Court relied on section 217A of the *Restatement (Second) of Contracts*[60] which permits appli-

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similarly relied on, may give rise to an effective promissory estoppel if the Statute would otherwise operate to defraud.

[50] See note 47 and accompanying text *supra*.

[51] Note, *supra* note 44, at 117.

[52] 16 Ariz. App. 415, 493 P.2d 1220 (Ct. App. 1972).

[53] 493 P.2d at 1225-26.

[54] Janke Constr. Co. v. Vulcan Materials Co., 386 F. Supp. 687, 696 (W.D. Wis. 1974), *aff'd*, 527 F.2d 772 (7th Cir. 1976).

[55] Monarco v. Lo Greco, 35 Cal. 2d 621, 220 P.2d 737, 739 (1950) (en banc) (action for partition and accounting); Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 94-96 (1910) (court, speaking in terms of an equitable estoppel which involves a misrepresentation of fact, was actually dealing with a promise to be done in the future—promissory estoppel), *aff'd on rehearing*, 162 Cal. 318, 122 P. 847 (1912); Sessions v. Southern Cal. Edison Co., 47 Cal. App. 2d 611, 118 P.2d 935, 939-40 (Dist. Ct. App. 1941) (promissory estoppel applied to employment relationship despite the Statute of Frauds).

[56] Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 94 (1910), *quoting* 3 J. POMEROY, EQUITY JURISPRUDENCE § 921, at 618 (5th ed. 1941). *See also* 2 A. CORBIN, CONTRACTS § 422A (Supp. 1971) (advocates extension of the doctrine of promissory estoppel to preclude assertion of the Statute of Frauds).

[57] 35 Cal. 2d 621, 220 P.2d 737 (1950) (en banc).

[58] 220 P.2d at 741. "It is not the representation that the contract will be put into writing . . . but the promise that the contract will be performed which the promisee relies upon." *Id.*

[59] McIntosh v. Murphy, 52 Hawaii 29, 469 P.2d 177, 177 (1970) (oral employment contract).

[60] RESTATEMENT (SECOND) OF CONTRACTS § 217A(1) (Tent. Draft Nos. 1-7, 1973) would considerably suppress the controversy over whether § 90 of the *Restatements* is intended to preclude assertion of the Statute of Frauds since § 217A(1) provides that:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does

cation of the doctrine of promissory estoppel without regard to the Statute of Frauds where there has been reliance on an oral contract.[61]

With the arrival of the Uniform Commercial Code[62] and its own Statute of Frauds, section 2-201,[63] came substantial changes in the common law statute.[64] A critical aspect of section 2-201 with regard to the construction bidding process[65] is that it applies only to contracts for the sale of "goods."[66] Since construction subcontracts commonly encompass both goods and labor and since contracts for "goods plus labor" evidently are outside of the scope of the U.C.C.'s definition of "goods,"[67] most construction contracts are not governed by the

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induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.

See id., Comment a (§ 217A complements § 90 in that both apply in cases involving estoppel or fraud); Note, *supra* note 44, at 118 (§ 217A allows enforcement of an oral promise even absent an ancillary promise to reduce the agreement to writing). The second *Restatement* also dropped Comment f to § 178. *But see* RESTATEMENT (SECOND) OF CONTRACTS § 178, Comment d (Tent. Draft Nos. 1-7, 1973) (an oral promise may be enforced to the extent justice requires notwithstanding the Statute of Frauds).

[61] 469 P.2d at 181.

[62] The Uniform Commercial Code has been adopted, with slight modifications in certain sections, in all fifty states as well as in the District of Columbia and the Virgin Islands. However, Louisiana adopted only Articles 1,3,4 and 5. EXPLANATION TO AMERICAN LAW INSTITUTE & NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1 UNIFORM COMMERCIAL CODE (U.L.A.) III (1976).

[63] *See generally* Corbin, *The Uniform Commercial Code—Sales; Should It be Enacted?*, 59 YALE L.J. 821, 829 (1950); Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 573 (1950); *A Symposium of the Proposed Uniform Commercial Code*, 17 ALB. L. REV. 1, 16 (1953). See text accompanying note 71 *infra*.

[64] See note 7 *supra* for the text of the statute as adopted by California.

[65] Although not within the scope of this Note, another provision of the U.C.C. which would potentially have an impact on the construction bidding process is U.C.C. § 2-205 which deals specifically with "firm offers" and restricts the offeror's right to withdraw. The purpose of § 2-205 is to restrict the offeror's right of withdrawal where there has been reasonable reliance on the offer by the offeree. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE §§ 1-3 (1972). However, § 2-205 will apply only where its terms are met, *i.e.* there must be a written offer for the sale of goods. Unfortunately, a large number of sub-bids are made orally or involve "goods plus labor." Note, *supra* note 24, at 215. If the offer fails to comply with the requirements of § 2-205, the offeree may still rely on those decisions which have applied the doctrine of promissory estoppel to the construction bidding process. See notes 38 through 40 and accompanying text *supra*. Since § 2-205 was not designed for situations involving a substitute for consideration, it should not be applied in such a manner as to preclude the application of promissory estoppel. J. WHITE & R. SUMMERS, *supra*, at 34.

[66] U.C.C. § 2-105(1) provides in pertinent part:

"Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action.

[67] Comment, *supra* note 24, at 567. See note 66 *supra*.

U.C.C. Statute of Frauds. However, an assumption that section 2-201 is never applicable to this aspect of the construction bidding process would be incorrect since some subcontracts deal exclusively with provision of construction materials.[68] Section 2-201(3)(a),[69] for example, provides a specific exception to the statute which is designed to protect certain types of reliance. Although this subsection is only one of four stated statutory exceptions in the U.C.C., it is reasonable to expect that courts will formulate additional judicial exceptions to the U.C.C. Statute of Frauds when other types of justifiable detrimental reliance can be shown.[70] With this premise in mind, it is also reasonable to assume that the pre-Code judicial exceptions to the Statute of Frauds remain viable and are applicable to the U.C.C. Statute of Frauds.[71] Indeed, the pre-Code divergence of authority as to the interrelationship of the doctrine of promissory estoppel and the Statute of Frauds has continued post-Code.[72] Although the U.C.C. does not directly address the issue of whether the doctrine of promissory estoppel is available to preclude assertion of the Statute of Frauds, it does allow the continued use of common law estoppel by providing that the principle remains applicable to all of its provisions[73] unless expressly disallowed by a particular section.[74] It appears that those courts confronted with a clash between promissory estoppel and the Statute of Frauds nevertheless continue to reach

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[68] R. ANDERSON, 1 UNIFORM COMMERCIAL CODE § 2-105:10 (2d ed. 1970 & Supp. 1977); Comment, *supra* note 24, at 567; Note, *supra* note 24, at 215. *But see* Jenkins & Boller Co., Inc. v. Schmidt Iron Works, Inc., 26 Ill. App. 3d 1044, 344 N.E.2d 275, 278 (App. Ct. 1976) (court applied U.C.C. Statute of Frauds to a subcontract for furnishing and installing various metal goods).

[69] See note 7 *supra* for the text of the statute.

[70] Holahan, *Contract Formalities and the Uniform Commercial Code,* 3 VILL. L. REV. 1, 16 (1957).

[71] J. WHITE & R. SUMMERS, *supra* note 65, at 59.

[72] *See* Tiffany Inc. v. W.M.K. Transit Mix, Inc., 16 Ariz. App. 415, 493 P.2d 1220, 1225-26 (Ct. App. 1972) (refusing to apply promissory estoppel to prevent a subcontractor from asserting the defense of the U.C.C. Statute of Frauds in an action by the general contractor after reliance on the sub-bid), see text accompanying notes 50 through 53 *supra* for an explanation of the court's position; Del Hayes & Sons, Inc. v. Mitchell, 230 N.W.2d 588, 592-94 (Minn. 1975) (promissory estoppel not available to soybean buyer to take oral contract out of U.C.C. Statute of Frauds); Farmland Service Corp., Inc. v. Klein, 196 Neb. 538, 244 N.W.2d 86, 90 (1976) (since U.C.C. Statute of Frauds does not contain a promissory estoppel exception, the doctrine is inapplicable to an oral contract for sale of corn unenforceable under the statute). *But see* Janke Constr. Co. v. Vulcan Materials Co., 386 F. Supp. 687, 697 (W.D. Wis. 1975) (supplier of goods must comply with his sub-bid relied upon by general contractor in calculating prime bid even though an oral contract for the sale of goods would be governed by the U.C.C. Statute of Frauds), *aff'd,* 527 F.2d 772 (7th Cir. 1976); Jenkins & Boller Co. v. Schmidt Iron Works, Inc., 36 Ill. App. 3d 1044, 344 N.E.2d 275, 278 (1976) (promissory estoppel applicable to bind subcontractor to his bid even though the written sub-bid did not comply with the U.C.C. Statute of Frauds); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 547 P.2d 323, 329-30 (1976) (promissory estoppel applicable to oral contracts covered by U.C.C. Statute of Frauds through U.C.C. § 1-103). See notes 73 & 74 and accompanying text *infra.*

[73] U.C.C. § 1-103.

[74] [1977] 3 UNIFORM COMMERCIAL CODE SERVICE (Bender) § 2.04[6].

their decisions on the basis of pre-Code considerations,[75] although the number of cases permitting application of the doctrine to preclude assertion of the statute is increasing.[76]

Both pre-Code and post-Code cases have been based upon the premise that the doctrine of promissory estoppel is an exception to the Statute of Frauds. Unfortunately, only a very few cases have recognized the important conceptual distinction between an action for breach of a contract which is unenforceable due to the Statute of Frauds and an action for revocation of an offer after detrimental reliance thereon by the promisee under the doctrine of promissory estoppel.[77] Promissory estoppel applies to promises and offers or, in the construction bidding process, to subcontractors' bids—not to contracts.[78] A recent construction bidding case dealing with promissory estoppel and its interaction with the U.C.C. Statute of Frauds is *Janke Construction Co. v. Vulcan Materials Co.*,[79] where a pipe supplier refused to honor its telephonic sub-bid to the general contractor. The court, clearly recognizing the above distinction,[80] held that while the general contractor's use of the supplier's bid in calculating his prime bid was not an acceptance creating a contract, it did give rise to the doctrine of promissory estoppel.[81] Since the Statute of Frauds is concerned only with the enforceability of contracts, and the doctrine of promissory estoppel involves promises having no contractual foundation, the Statute of Frauds is inapplicable in a case which is a proper subject for the implementation of

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[75] See notes 46, 47, 49, 50 & 54 through 56 and accompanying text *supra*. *But see* Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 547 P.2d 323, 329-30 (1976) (promissory estoppel applicable to oral contracts covered by U.C.C. Statute of Frauds through U.C.C. § 1-103).

[76] Note, *supra* note 44, at 114. The increasing number of courts which have employed RESTATEMENT OF CONTRACTS § 90 (1932) as a method of preventing assertion of the statute is indicative of a notable change in viewpoint concerning the interaction of the statute with the doctrine of promissory estoppel. J. CALAMARI & J. PERILLO, *supra* note 13, § 327, at 500. The trend culminated with the codification of this judicially-created exception to the statute in RESTATEMENT (SECOND) OF CONTRACTS § 217A (Tent. Draft Nos. 1-7, 1973). Note, *supra* note 44, at 114. See note 60 *supra*.

[77] *See, e.g.*, N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736, 738 (D.C. Cir. 1963) (the authorities do not "always keep clear the distinction between traditional rules of contract law and the principles of promissory estoppel"); L. SIMPSON, *supra* note 14, § 61, at 117-18 (the general contractor cannot recover from a revoking subcontractor on the basis of contract since there is none, but he can recover on the doctrine of promissory estoppel). *See generally* Henderson, *supra* note 15.

[78] *See* Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757, 760 (1958) (holding that an irrevocable offer arose as a result of the general contractor's reliance on the sub-bid instead of holding that there was a contract). *But see* Tiffany Inc. v. W.M.K. Transit Mix, Inc., 16 Ariz. App. 415, 493 P.2d 1220, 1225-26 (Ct. App. 1972) (if the statute requires a writing, the offer may not be enforced even though promissory estoppel would otherwise make the promise binding).

[79] 386 F. Supp. 687 (W.D. Wis. 1974), *aff'd*, 527 F.2d 772 (7th Cir. 1976).

[80] Further evidence of this distinction is found in the measure of damages. *See generally* Fuller & Perdue, *supra* note 12, at 401-06; Note, *supra* note 44, at 122-28.

[81] 386 F. Supp. at 691-95.

promissory estoppel.[82]

In the instant case, the court reasoned that since *Drennan* and the subsequent California cases applying its rationale involved bids for "construction work and materials subcontracts" rather than vendors of specific goods, section 2201 of the California Commercial Code was neither considered nor applicable in those cases.[83] Finding that section 2201 did apply in the instant case, the court held that application of the doctrine of promissory estoppel to subcontractors' oral bids for sale and delivery of materials would render section 2201 a virtual nullity.[84] The court determined that the California Supreme Court, if similarly confronted with the issue, would probably adopt the *Tiffany* approach[85] of permitting limited application of the doctrine of promissory estoppel to bar a Statute of Frauds defense only where there has been a misrepresentation that the statute's requirements have been met or an ancillary promise to make a memorandum.[86] The court also adopted in part the rationale of the lower court that since the intermediate approach of *Tiffany* did not virtually nullify the Statute of Frauds, it provided a "reasonable balance" between the statute and the doctrine of promissory estoppel. Such a holding would not only encourage businessmen to reduce their agreements to writing but would also mitigate[87] any unjust result which might be caused by unyielding application of the Statute of Frauds.[88]

Judge Wallace dissented, contending first that no rational basis existed for distinguishing between cases where goods plus labor are provided and those where only goods are provided.[89] Furthermore, since the California law governing the construction bidding process makes a subcontractor's bid irrevocable for a reasonable time after award of the prime contract to the general contractor,[90] a subcontractor should not be permitted to withdraw its offer for a reasonable time when the general contractor has relied on it in submitting the prime bid.[91] Finally, Judge Wallace pointed out that since the Statute of Frauds applies to contracts, rather than offers, the initial question should have been one of formation, with a negative answer allowing assertion of the doctrine of promissory

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[82] *Id.* at 697; *accord,* N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736, 740 n.9 (D.C. Cir. 1963) ("The issue as to the applicability of the Statute of Frauds is no longer germane in light of our holding that no contract was created.").

[83] C.R. Fedrick, Inc. v. Borg-Warner Corp., 552 F.2d 852, 856 (9th Cir. 1977).

[84] *Id.* at 856-57.

[85] *Id.* at 857. See text accompanying notes 47 through 53 *supra.*

[86] *Id.* at 856.

[87] In a brief concurring opinion, Judge Duniway expressed his belief that the California Legislature's adoption of the liberalized U.C.C. Statute of Frauds indicated an intent to provide a statutory substitute for the judicially created mitigating rules which had worked to alleviate some of the hardship created by the Statute of Frauds. Therefore, the judicially established mitigating rules had no application in a § 2201 case. *Id.* at 858 (Duniway, J., concurring).

[88] 552 F.2d at 856-57.

[89] *Id.* at 859 (Wallace, J., dissenting).

[90] *Id.* at 858.

[91] *Id.* at 859.

estoppel by the plaintiff.[92]

The decision of the court in the instant case is susceptible to criticism on several grounds. First, given the liberal position taken by the California Supreme Court on both promissory estoppel as applied to the construction bidding problem[93] and estoppel to assert the Statute of Frauds,[94] the court's determination that the California Supreme Court would probably take the same approach appears tenuous and doubtful. Indeed, California was the initiating court in this area of the law with its landmark decision in *Drennan v. Star Paving Co.*[95] While *Drennan* is not directly on point since neither the Statute of Frauds nor the U.C.C.[96] was involved in that case, a strong tradition in California case law favors a holding opposite that of the instant case. Specifically, in *Monarco v. Lo Greco*,[97] the California court expressly rejected the *Tiffany* rationale[98] which allows promissory estoppel to bar assertion of the Statute of Frauds only in cases of misrepresentation that the statute has been or will be complied with.[99] Second, the instant court formulated an irrational distinction between subcontracts dealing with "goods plus labor" and those which deal only with "goods."[100] The net effect of this distinction was to bring the transaction in the instant case, *i.e.* one which dealt only with "goods," under the provisions of the U.C.C. Statute of Frauds. At most, that should have been the only effect. No logical distinction can be drawn between application of the doctrine of promissory estoppel to enforce an oral sub-bid not covered by the U.C.C., as articulated in the *Drennan* line of cases, and an oral sub-bid covered by the U.C.C., as in the instant case. It is illogical that a "goods" subcontractor should be permitted to refuse to honor his bid without incurring liability while a "goods-plus-labor" subcontractor is, under the same circumstances, liable to the general contractor for damages incurred in reliance on the sub-bid. Certainly the damage to the general contractor and the resulting equities in his favor are of the same magnitude in either situation. Third, promissory estoppel is an equitable doctrine,[101] and rendering justice is exactly the problem the courts face in a construction bidding situation.[102] The cases which have followed *Drennan*,[103] as well as the treatises[104] and

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[92] *Id.*

[93] See note 41 and accompanying text *supra*.

[94] See notes 54 through 58 and accompanying text *supra*.

[95] 51 Cal. 2d 409, 333 P.2d 757 (1958). See notes 33 through 38 and accompanying text *supra*.

[96] *Drennan* was decided in 1958, and the U.C.C. did not become effective in California until 1965. Furthermore, *Drennan* involved "goods plus labor" and would not have been covered by the Code. See note 69 and accompanying text *supra*.

[97] 35 Cal. 2d 621, 220 P.2d 737 (1950) (en banc).

[98] See text accompanying notes 56 through 58 *supra*.

[99] See note 49 *supra*.

[100] 552 F.2d at 859 (Wallace, J., dissenting).

[101] *See generally* J. POMEROY, *supra* note 56, § 921; S. WILLISTON, *supra* note 45, § 533A.

[102] See notes 10 & 20 and accompanying text *supra*.

[103] *See, e.g.*, E.A. Coronis Assocs. v. M. Gordon Constr. Co., 90 N.J. Super. 69, 216 A.2d 246, 251 (1966) ("It is only right and just that a promise a promisor knows will induce action of a substantial character be enforced if it is in fact relied on."). See note 40 *supra*.

other legal writings,[105] are replete with language recognizing that justice is the prerequisite to and the principle underlying the application of promissory estoppel to the construction bidding process.[106] Section 217A of the *Restatement (Second) of Contracts* clearly perceives this and, in language taken virtually verbatim from the language of section 90, states that the promise is enforceable in spite of the Statute of Frauds, "if injustice can be avoided only by enforcement of the promise."[107] It would seem, therefore, that the construction bidding process is a logical area for the application of promissory estoppel.

The *Tiffany* approach, by refusing to apply promissory estoppel, affords the general contractor no protection and produces an unjust result. Instead of recognizing that the sub-bidding process involves a substantial number of oral bids[108] and attempting to fashion legal principles which can function within that framework to minimize injustice to all concerned, the instant court's *Tiffany* approach attempts to change the customary bidding procedures of an entire industry by encouraging contractors to reduce their bids to writing. The present court was not faced with a situation requiring strict application of a statute since it was dealing with a statute to which numerous judicial exceptions have been appended to obviate harsh results and injustice.[109] Contrary to the court's contention, application of the promissory estoppel doctrine would not render the U.C.C. Statute of Frauds a "nullity" any more than it had rendered the pre-Code statute a nullity. Such an ancient device as the Statute of Frauds, which may have long outlived its usefulness,[110] should not be permitted to inflict injustice on a general contractor who justifiably relies to his detriment on an oral bid submitted by a subcontractor. Rather than rendering the statute a nullity, a promissory estoppel exception dictated by the practical business needs of the construction industry would provide a flexible and just solution to a specific problem for which, due to industry-wide practices, the statute does not effectively deal. Because the U.C.C. specifically provides that the principle of estoppel remains viable,[111] the instant court had a firm statutory foundation and ample precedent upon which to base a more equitable holding.

Finally, the court failed to distinguish the conceptual difference between an action for breach of a *contract* unenforceable due to the Statute of Frauds and an action under section 90 of the Restatement for revocation of an *offer* after

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[104] *E.g.*, S. WILLISTON, *supra* note 32, at 421.

[105] *E.g.*, 28 ILL. L. REV. 419, 421 (1933).

[106] *See* Henderson, *supra* note 15, at 383 ("The granting of relief under Section 90 depends ultimately upon a judgment that enforcement is necessary to avoid injustice.").

[107] See note 60 *supra*.

[108] Note, *supra* note 24, at 215.

[109] *See* McIntosh v. Murphy, 52 Hawaii 29, 469 P.2d 177, 179-80 (1970) (brief history of judicial circumvention of the Statute of Frauds); J. CALAMARI & J. PERILLO, *supra* note 13, § 282, at 443.

[110] *See generally* A. CORBIN, *supra* note 56, § 275, at 8-14. *But see* J. MURRAY, *supra* note 11, § 312, at 641-42 (supportive arguments in favor of the statute); S. WILLISTON, *supra* note 45, § 448, at 344-47 (same).

[111] U.C.C. § 1-103. See text accompanying notes 73 and 74 *supra*. California adopted this section of the U.C.C. as CAL. COM. CODE § 1103 (West 1964).

detrimental reliance thereon by the promisee.[112] Since section 2-201 of the U.C.C. refers to *contracts* for the sale of goods,[113] it should not have been utilized by the instant court to prevent application of the doctrine of promissory estoppel to enforce the defendant's *offer*. The holding in the present case represents a significant reversal of the *Drennan* line of cases as applied to the materials subcontracting segment of the construction industry and is a precedent which, in order to deal with the construction bidding process as equitably as possible, other courts would be wise not to follow.

W. Eugene Magee

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[112] This distinction was recognized and raised by the plaintiff, but the court failed to directly address the issue. 552 F.2d at 856.

[113] See notes 66 through 68 and accompanying text *supra*.

BOOK REVIEW

How to Go Directly into Solo Law Practice
(Without Missing a Meal)

By Gerald M. Singer
New York: The Lawyers Coop. Publishing Co. 1976
Pp. 604 $16.00

*John G. Corlew**

It is difficult to read *How to Go Directly into Solo Law Practice* without some degree of skepticism. The book is 604 pages of simple observations on every subject from how to rent a law office to how to get appointed to a judgeship. It is full of the age-old cliches of the legal profession: "bill your friends," "keep the client informed," "get an attorney-client contract signed," and so on. In short, it is a compendium of tips on how the beginning solo practitioner can set up an office economically, attract business, stay out of trouble and make money—long on advice with respect to the law as a business and short on anything with respect to the law as a service profession.

However, the book is not without merit. For the young lawyer fresh out of law school and opening his own office, there are many valuable tips. There is an excellent section on how to set up client files, a filing system, a court calendar and a critical date schedule. The discussion of the proper relationship to be observed with fellow attorneys is particularly appropriate. Thus, although the young attorney starting practice with a firm or with an experienced lawyer will undoubtedly receive better guidance than Mr. Singer's book affords, for the young attorney starting cold on his own, *How to Go Directly into Solo Law Practice* at least identifies most of the business and practical problems he will face. And, where the means of coping with the problems are not obvious, the author wisely suggests that the young lawyer seek the counsel of a more experienced member of the bar.

A broader question which a book such as Mr. Singer's suggests is whether law school graduates should be allowed to go directly into solo practice without having completed some type of internship program. It would appear that the complexity of the practice of law and the degree of harm which can come to the client at the hands of an inexperienced and unknowing lawyer dictate that the legal profession examine this question critically. Our law schools are not designed to prepare graduates for the practical aspects of the practice of law, nor should they be. Perhaps it is time that an internship be required to bridge the gap between law school and law practice—at least for the graduate who will not be receiving the benefit of on-the-job training through association with a practicing attorney or firm.

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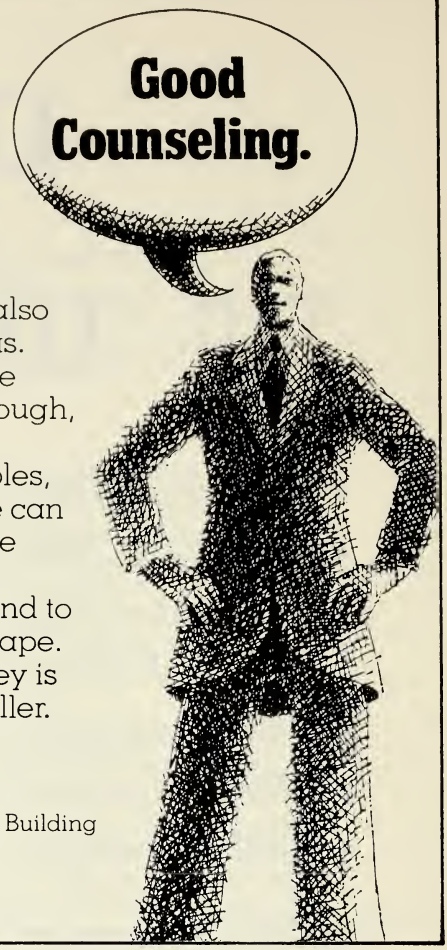

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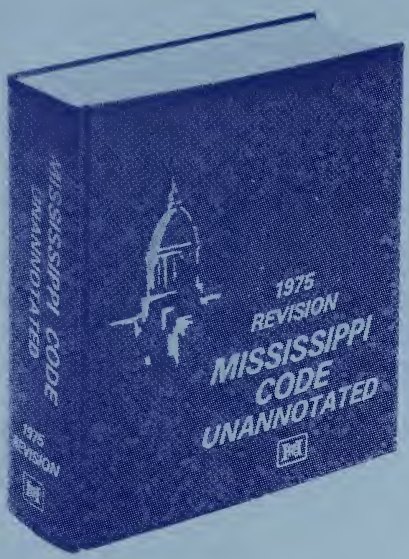

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